United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2042

To be Argued by
Harvey W. Spizz

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

B P/S

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UNITED STATES OF AMERICA
ex rel WILLIAM WOODEN,

Petitioner-Appellant,

Docket No. 74-2042

-against-

LEON J. VINCENT, Superintendent
Green Haven Correctional Facility,
Stormville, New York,

Respondent-Appellee

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BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

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STATEMENT OF THE ISSUES

1. Whether admission into evidence of post-indictment statements deliberately elicited by both the police and district attorney after Miranda warnings but in the absence of counsel violated petitioner's Sixth Amendment right to counsel.

2. Whether the admission of the post-indictment statements into evidence was harmless beyond a reasonable doubt.

3. Whether the petitioner was denied his Sixth Amendment right to effective assistance of counsel where the trial court compelled him to choose between waiving assistance of counsel and proceeding pro se or continuing with an admittedly unprepared and uninterested counsel whom he had lost confidence in for substantial reasons--the trial court made no inquiry into petitioner's allegations as to his counsel's lack of preparation.

STATEMENT OF THE CASE

WILLIAM WOODEN, appellant, was convicted on May 18, 1970, after a trial by jury, in Nassau County Court, of Murder, Manslaughter First Degree, Robbery First Degree and Grand Larceny Third Degree and sentenced to concurrent indeterminate terms, the maximum of which is life imprisonment and the minimum of which is twenty-five years imprisonment on the murder charge; a maximum of twenty-five years each for the manslaughter and robbery first degree charges; and a maximum of four years for the larceny charge. The judgment of conviction has been affirmed without opinion by the Appellate Division, Second Department, 38 App. Div. 2d 690, 328 N.Y.S. 2d 662 (December 20, 1971) and the New York Court of Appeals 31 N.Y. 2d 753, 290 N.E. 2d 436, 338 N.Y.S. 2d 434 (November 2, 1972), with three judges concurring in the affirmance without opinion "on constraint of PEOPLE v. LOPEZ, 28 N.Y. 2d 23, 268 N.E. 2d 628, 319 N.Y.S. 2d 825, cert. denied, 404 U.S. 840 (1971); but see United States ex. rel. LOPEZ v. ZELKER, 344 F. Supp. 1050, (S.D.N.Y.), aff'd mem. 465 F. 2d 1405 (2d Cir.) (cert denied, 409 U.S. 1049 (1972))." [1]

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1. In United States ex. rel. LOPEZ v. ZELKER, 344 F. Supp. 1050 (S.D.N.Y.), aff'd mem. 465 F. 2d 1405 (2d Cir.), cert. denied, 409 U.S. 1049 (1972), Judge Frankel of the Southern District held the dissenting opinion of the New York Court of Appeals, 28 N.Y. 2d 23, 268 N.E. 2d 628, 319 N.Y.S. 2d 825, cert denied, 404 U.S. 840 (1971) to be the correct statement of federal constitutional law.

Certiorari was denied by the United States Supreme Court on March 19, 1973, 410 U.S. 987 (1973).

The appellant petitioned the District Court for a writ of habeas corpus pursuant to 28 U.S.C. Sections 2241, 2254 on December 4, 1973. The petition was argued before the Honorable Kevin T. Duffy (D.J.) on January 4, 1974. On July 15, 1974, the District Court denied the petition for a conditional writ of habeas corpus. Judge Duffy granted appellant's application for a certificate of probable cause on July 26, 1974 and appellant duly filed his notice of appeal on July 31, 1974.

STATEMENT OF FACTS

Introduction

This case presents a rather anomalous situation under which the petitioner, William Wooden, was put through two murder "trials", both without the benefit of counsel. The first "trial" consisted of a six-hour post-indictment interrogation, conducted by the police and the District Attorney who presented the case to the Grand Jury and who would later try the case, prior to the appointment of counsel. The first "trial" made the second "trial" before a judge a mere formality. However, even at this formal trial petitioner was without benefit of counsel. The trial judge gave the petitioner the "option" of going to trial with an admittedly unprepared and uninterested counsel or conducting his own defense in a murder trial. Petitioner's "option" of defending himself resulted in a one-sided trial marked by undue haste, by hearsay "eyewitness" accusations of the defendant as the killer, and by a jury that did not know that two of the People's witnesses were already under indictment for falsely testifying on precisely the same matters at an earlier trial of a co-defendant.

THE CRIME

Early Sunday morning, February 18, 1968, John Hartel, the station agent at the Long Island Railroad Station, was found shot to death and $384.00 was missing from the station (547, 553, 571).*

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*Numbers in parenthesis refer to pages of the State trial record filed with the court. Numbers followed by "a" are found in the appendix.

Three men were promptly indicted. Further investigation led to dismissal of that indictment against two of them on motion of the District Attorney (64, 723, 725). On March 12, 1968, the instant superseding indictment was filed. It charged William Wooden, John Banks, Ceasar Hill and Willie Smith with the robbery-murder of John Hartel. The case had been presented to the Grand Jury by Assistant District Attorney John Lewis (269).

POST-INDICTMENT INTERROGATION

Petitioner was arrested at about 8 p.m. on April 28, 1968, seven weeks after he was indicted for the murder, and long after his three indicted co-defendants were in custody and had confessed, implicating him in the homicide (165, 187, 678). With two previously indicted suspects now cleared (64, 725, 725) and all accomplices in custody (165, 187, 678), there was no aspect of the case still unresolved except that no defendant had admitted to being the triggerman (677, 678). Only the actual prosecution remained. Wooden was arrested by Nassau County Policemen Gunter and Sefton at the scene of a burglary call to which they were responding (68, 228). They recognized Wooden as wanted for murder (69, 243) and knew there was a warrant out for his arrest (89), but neither knew whether he had been indicted (82, 244). They did not tell Wooden what he was being arrested for (243).

The Patrolmen gave Wooden Miranda type warnings (69, 230) and Sefton said that Wooden told him he was going to give himself up and that "I didn't shoot him, I had the knife" (230). They called the stationnouse at 8:10 p.m. for assistance and a timetable of events indicates that one of

them mentioned Wooden (214, 247).

At 8:25 p.m. Wooden was at the Third Precinct "for investigation on the homicide and the burglary" (70), and a blotter entry made at 10:15 p.m. showed a warrant arrest under this indictment (93, 834). By 8:30 p.m. Wooden was upstairs in the second floor file room with Detective Lazorcak and Lieutenant Guido, Commander of the Homicide Squad (231, 234). He was handcuffed to a chair and Guido gave him additional Miranda type warnings (156, 176). He told Wooden, who agreed to make a statement, that "when you are finished we will ask the District Attorney to come in and you can talk to him also" (158).

Wooden was interrogated for approximately six hours, from 8:30 p.m. to 2:15 a.m. (231, 256). That interrogation was in two stages: the first conducted by the police in charge of the Hartel investigation and the second by the trial prosecutor himself.

At the outset of his interrogation Detective Guido told Wooden he had been indicted for murder (without specific mention of the felony murder count) and gave him Miranda warnings. Interspersed with that advice were two immediate announcements of his intention to question petitioner and four additional invitations to "talk" or "tell us the whole story." Petitioner said he knew what his "rights" were; that he understood he did not have to answer questions and that anything he said could be used against him in court. However, when asked if he understood his right to consult an appointed attorney before deciding whether to speak, the following exchange took place:

> Then I said, "If you can't afford an attorney, one will be appointed for you by the Court and we won't ask you any questions until you have had a chance to talk to that attorney if that is your wish," and again I said to him, "Do you understand that?" And he said, "Yes, but what difference does it make?" He said, "I am going to get life or sixty years, which to me is the same as life."
> He said, "There are three in the same family against me." I said, "I don't know what you're going to get. I know three other persons have been indicted with you in this and they have told us their version of what happened. Now I am asking you, do you want to talk to us, do you want to answer our questions without talking to an attorney?"
> (677-678) [emphasis supplied]

Petitioner shortly agreed to tell "the whole story" and admitted participation in the crime. Asked, "who did the shooting?," petitioner admitted knowledge that an accomplice was armed during the robbery, thereby in effect waiving the affirmative defense to felony murder in New York.* He was also asked if he remembered seeing and talking with a particular passerby at the scene of the robbery. He did, and thereupon his confession became capable of corroboration and, at least in that regard, admissible at trial since that passerby was an already available witness who would testify at his trial (679-680; 715-716).

Having taken only fifteen minutes to obtain an oral confession, an admission that would head off an affirmative defense, as well as corroboratory details, Detective Guido turned petitioner over to other detectives who over the next four hours, from 9:00 p.m. to 1:00 a.m. (135), after additional Miranda warnings, elicited and typed a six page confession (693-713) laced throughout with additional details known to be corroborable by already available witnesses who would in fact be called at the trial.

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* New York Penal Law Section 125.25 (3)

Detective Lazorcak who took over from Lieutenant Guido, had been on the investigation from the very beginning (124) and knew Wooden had been indicted (126). He had arrived at the scene of Wooden's arrest before 8:15 p.m. and recognized but did not talk to Wooden at that time (79, 132).

Around 10:00 p.m. Detectives Lannon and Hunter joined Lazorcak (143). Hunter, who also knew Mr. Lewis had presented the case to the Grand Jury (217), took over the typing somewhere after the first two paragraphs (137, 201, 207, 224). Lannon left by about 10:30 (144). Lazorcak and Hunter took until sometime around 1:00 a.m. (135) to elicit and type the six page confession (852).

After Detective Guido obtained the oral statement and turned petitioner over to others to obtain the full typed confession, he immediately telephoned Mr. Lewis, the Assistant District Attorney in charge of the Homicide Bureau (159). Mr. Lewis had presented the case to the Grand Jury (172) and later would actually try the case against petitioner.

Mr. Lewis arrived at the station at 10:00 p.m. and immediately read and discussed Guido's notes of his interrogation (170, 172). Although joined by his own stenographer within minutes of his arrival, the prosecutor waited almost four hours until the police were through and he had had a chance to study the typed confession (258, 270). Finally, at 1:45 a.m. he also interrogated Wooden, after further Miranda warnings, and by 2:15 a.m. he had yet another statement (728-729). The prosecutor did not tell Wooden he was indicted. Wooden was not arraigned in County Court on the murder indictment until much later in the day of April 29,

1968, and was remanded to custody.

Testimony indicated that at no time during the six and one quarter hours after his arrest did Wooden ask for a lawyer and that at no time was he abused or threatened (71, 108, 159, 195, 202, 231).

A pre-trial motion to suppress the statements was denied after a hearing (58-273) on the ground Miranda warnings had been given and his waiver of rights was knowing and voluntary (43-49). However, Detective Guido admitted that he saw his own interrogation as "preparing" for a trial (174, 175, 190), and Detective Lazorcak who took the typed statement, said he knew it would be used at trial (150, 152). The People argued in the New York Court of Appeals that the prosecutor, who took his own statement, knew at the time of interrogation that he had insufficient evidence to convict petitioner since there was neither eyewitness identification of him nor any accomplice testimony yet in prospect. (Res. Brief N.Y. Ct. of Appeals at 40, 41-42, a-23, 24).

WAIVER OF TRIAL COUNSEL

The County Court assigned two counsel (Cohn, Corcoran) to petitioner on April 30, 1968 (291). One (Corcoran) became ill and was relieved on December 12, 1969 and a substitute (Brown) was appointed to assist Cohn (280, 300). The cases against the four defendants had been severed for separate trials before the same judge because of their confessions, and the first co-defendant's (Hill) November 1969 trial resulted in a conviction.

During the last three months (December 22, 1969 to March 16, 1970) before his own trial date petitioner learned in jail that, in December, Hill was sentenced to 20 years to life, that in January two witnesses against Hill (and petitioner) were indicted for perjury at that trial (371, 395), and that in February accomplice Banks agreed to testify against him (Wooden) (312-313). During those same three months, counsel ignored repeated requests for a jail conference until three days before trial by which time petitioner had written (386) to a local Black attorney for help. At that visit counsel revealed total ignorance of those developments. Two days before trial petitioner for the first time met the second lawyer on the case and told him he wanted a substitution of senior counsel on the ground he had no faith in counsel's interest in defending him (288-290, 302).

First Motion

On the morning of trial two days later, Mr. Brown told Mr. Cohn that Wooden wanted a change of counsel and as soon as the case was called Mr. Cohn reported this to the Court with motions to be relieved and for a substitution. He asked the Court to "assign other counsel of this defendant's choosing or counsel that your Honor may choose, of which this defendant will approve" to represent him (288-289). Wooden took up this suggestion by counsel when he addressed the Court:

> The Defendant: Your Honor, I don't think I can go to trial with Mr. Cohn because of a lack of interest, because we can't communicate. I have been trying to do this. I don't think in any way he could represent me. He has tried, but due to circumstances of this whole case, the way things are running, it is impossible for me to say that Mr. Cohn could protect me.

> The Court might see it another way, but I don't see it that way, and I have to do the time that Mr. Cohn said. Mr. Cohn said that any time I don't agree with him, he would step down. I was supposed to see him on Thursday. I wrote a letter to Mr. Rivers. I don't know whether he talked to you or not, but I would like your Honor to assign him if he would take this case or anyone of my choosing. I could think of a few names that I would like to submit, but the Court would never give me permission to select counsel of my choosing. I would like the Court to have Mr. Rivers help Mr. Brown in my defense.
> (290-291)

The Court made certain that Wooden could not afford his own attorney (291). Mr. Cohn then said he could not communicate with Wooden who had lost confidence in him (292). No unexpected delay would be involved since Banks was supposed to be on trial at this time and he didn't know what happened to it or even why it had not gone ahead (300). Mr. Brown urged the Court to give priority to the trust and confidence essential to the lawyer-client relationship rather than to calendar clearance, and said that nothing suggested Wooden was simply trying to stall (296). Both counsel argued that Wooden was not insisting on picking his own lawyer (295, 297) as Wooden himself had recognized that he could not (291), but was merely asking the Court to consider Mr. Rivers if a substitution were made (295).

Mr. Brown was willing to act as primary counsel and could proceed with no difficulty if given an assistant and a week to ten days to prepare (298).

The Court commented on counsel's experience, reputation, and time in the case (294). The Court did not ask Wooden why or when he had

lost confidence in his lawyer, but did express its own confidence that counsel "is as familiar with this case as a lawyer could possibly be" (303). After commenting on the lateness of the application, the importance of moving jail cases, and the fact that an indigent defendant could not pick his own lawyer (293-294) the Court added:

> Certainly if he doesn't want you, it creates a problem, but I don't know whether Mr. Wooden realizes that he has a perfect right to defend himself, but I don't think he is asking for that.
>
> You are not asking to defend yourself, are you, Mr. Wooden?
>
> The Defendant: No, your Honor.
>
> (294)

That colloquy constitutes the first reference in the trial record to the possibility, ultimately realized, of Wooden attempting to defend himself. (See, however, the Court's colloquy at the Huntley Hearing, 266-267, for its even earlier mention of this theoretical possibility during argument on suppression).

Assistant District Attorney Lewis (who had gotten the indictment, and then the confession, and who was now trying the case) made no objection and claimed no prejudice (301). He commented on the "strangeness of the hour," counsel's ability, a substitute counsel's entitlement to an adjournment, a suggestion that counsel simply switch roles, and the possibility that the whole thing was a dilatory tactic since Wooden never mentioned it when the question came up at the December proceeding (although Wooden was not present at that time).

In the presence of his two counsel, and without any contradiction from them, the defendant then stated:

The Defendant: May I say something, your Honor?

The Court: Anything else you want to say, Mr. Lewis?

Mr. Lewis: No, your Honor.

The Defendant: Your Honor, since December 22nd, the day I walked out of court, I have not seen Mr. Cohn. I have sent letters. I have had my wife call and I have not seen Mr. Cohn under any circumstances until Thursday of this last week.

During this period of time there have been a lot of things happening in this case, and Mr. Cohn knows nothing about them whatsoever. I have asked him about matters he didn't know, matters that might be good to my defense or might not, but still things to the case.

The Court: Have you spoken to Mr. Brown in the meantime?

The Defendant: No, sir. I spoke to Mr. Brown on Saturday. I think this Court has delayed this case for two years, so I don't see why I can't get a stay for a month. I see no difference.

(302)

Assured again that defendant was without funds to retain his own counsel (303), the Court took a recess and then denied both motions:

The Court denies both applications. We have already discussed this matter at great length in the argument, but I should like to again point out that in my judgment, Mr. Cohn is one of the leading attorneys of the Criminal Bar of this County. He has been in the case for almost two years. He had conducted the Huntley Hearing, which of course disclosed whatever statements this defendant has made. He was present from the time at least during the identification hearing and that since that time there has been a trial in this Court of People v. Hill, and I feel confident that Mr. Cohn is familiar with that record.

The Court further has in mind that co-counsel, Mr. Brown, has been in the case since December 12th or thereabouts, that this case has been set for trial on several occasions by consent, and that now we have reached the point where this jury is about to be selected, and for the first time this application is made, and I am inclined to feel that the application is made for the purpose of delay. But in any event, there has been no sound reason presented to this Court why this defendant cannot be ably represented, and I refer as far as the law is concerned to the case of People v. Brabson, 9 N.Y. 2d 173, where the Court has cited what has been the law as far as I know and still is the law. 'That

> as long as assigned counsel are men of ability and integrity, the discretion and responsibility for their selection rest with the Court to be exercised free of outside interference.' This defendant has stated he cannot communicate with counsel. That is up to the defendant. The Court has afforded him an opportunity, if he so wishes, to be represented by counsel of men of ability and integrity. If he doesn't want to afford himself of that, that is up to him. Let us proceed.
> (303-304)

The record does not indicate that counsel had been asked whether he was familiar with the Hill record, but, as shortly made clear in fact he had not even read it (371, 375). The Court made no mention of counsel's admitted lack of information (300) about the Banks' trial. Additionally, the record indicates only one prior adjournment, attributable to the death of counsel's mother (299, 300, 383). Morever, the record does not indicate that the Court attempted to elicit a statement of Wooden's reasons and contains no mention by the Court of the prosecutions' failure to claim prejudice.

Counsel's Admissions of Lack of Preparation

Over the next hours and days, there followed a series of admissions by counsel, on the record, concerning his readiness for trial, none of which had been elicited by the Court which continued to deny a substitution, and continued to find bad faith in petitioner's lack of confidence, despite the fact that the People never complained that a substitution would involve any prejudice: (a) counsel had not known that accomplice Banks had agreed to testify or that the Banks trial had as a result been cancelled and that was the reason he was on trial weeks sooner than he expected (300, 312-314); (b) he had not known that two of the likeliest witnesses against his client, and who did later testify, had

two months earlier been indicted for perjury at the Hill trial nor what, nor even for which side, they had testified (305, 371); (c) he possessed but had not read the minutes of that earlier (Hill) trial which contained testimony on the same issues by the same witnesses as were about to be called against petitioner (375); (d) he did not know the actual sentence imposed three months earlier by the same Trial Judge upon the earlier tried accomplice (389-390) Petitioner, of course had known about the Banks deal, the perjury indictments, and the Hill sentence and could have alerted counsel to these facts which, for want of continuing independent investigation, he did not know. But counsel had not visited him for three months.

Second Motion

Counsel's motion was renewed at the start of the third day (387). No juror had yet been sworn (414). Wooden's letter from Robert Rivers was read by the Court and made part of the record (387) (but not included in the printed record).* Apparently treating them as a specific request to

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* Appellant's counsel obtained a copy of the letter from Mr. Rivers. It read as follows:

> I have reviewed your letter of March 10, 1970 and I have discussed this matter with my staff and my partner. Although we are presently bogged with cases, as a lawyer it is my belief that a man is entitled to the attorney of his own choosing. For a man in your position this is doubly so. As you are presently represented by an attorney, there is nothing further I can do at the present time, however, you are free to make the motion you deem advisable before the Court on your appearance on March 16, 1970. I shall be guided by the Court's advice. (Signed Dench, Rivers and Baldwin by Robert Rivers)

assign Mr. Rivers, though not so phrased, the Court summarily denied the motions:

> The Court: Well, the application to be relieved is denied. We have put that in the record previously, no use of repeating this constantly. He is requesting that I assign Mr. Rivers. This Court will not assign Mr. Rivers. This Court has assigned two eminently competent counsel.
>
> I might also add that there is not assurance here in reading this letter that Mr. Rivers would on any fixed date, would even be in a position to handle this case. This letter I will make part of the record at your request.
>
> (387)

Wooden then received permission to speak (388):

> The Defendant: Your Honor, I don't have counsel.
>
> The Court: All right. Now look, we are not going to go through this again day after day.
>
> The Defendant: I am not going to go through it any more, your Honor.
>
> The Court: I have told you what we are going to do here and this is about the last time I'm going to discuss this. You are an intelligent man and you understand what I am talking about. You have two eminently good counsel. I have made that statement clear. I don't say you don't want them, but I think you have indicated that you are satisfied with Mr. Brown but not with Mr. Cohn.
>
> The Defendant: Excuse me. Could I say something else? I am not trying to be smart. I'm not trying to do anything in this courtroom. I am only trying to get a fair trial and which I see, maybe you don't see it, but I heard Mr. Cohn stand up and say yesterday in this court on the perjury charge that happened in December, he didn't hear it, hear about it until I told him. He's not following this case, your Honor. It is impossible that from December to March, which is a lapse of three months, he didn't hear anything. He didn't even know the time you gave the other co-defendant in this case. How can I come to court?
>
> The Court: You say he didn't know the sentence of the co-defendant?
>
> The Defendant: No, sir.
>
> Mr. Cohn: I was not aware that there was any particular sentence at the time. I assumed your Honor sentenced this co-defendant on the basis for his conviction for murder that

> he was charged with. I was aware of the fact that he had been convicted on all counts of the indictment, but as far as particularities and sentences concerned, I did not discuss this with Mr. Wooden, and I do not know when this perjury indictment came down. I doubt whether it came down in December, but I could be wrong, but I must confess I was not aware of that perjury through any source whatever and it was not brought to my attention by the District Attorney, and I did not read it at any legal forum or legal publication.
>
> The Court: All right. Now I think when we recessed yesterday there was a question as to the method by which the peremptory challenges would be exercised * * *
>
> (389-390)

The record does not indicate that the Court reconsidered the motions or its original reasons for denying them.

Third Motion

By the sixth day, ten jurors had been selected (479) when Mr. Brown reported that Wooden would like a "reasonable opportunity to obtain counsel of his own choosing" because "he now, as opposed to last week, is in a position whereby he could retain counsel of his own choosing" (480).

Wooden made further complaints about counsel and about the presence of policemen in the courtroom, "objecting to this whole thing, your Honor. And as far as I'm concerned, I still don't have counsel * * * From now on in, I am not saying anything. I don't have anything to do with this case. This case is lost" (481-482).

For the third time Mr. Cohn renewed his application to be relieved from an "impossible situation." The Court was not "impressed" with Mr. Cohn's complaints that he was totally ignored by the defendant who "has no confidence in me at all," and that, "I have no function. I just sit here" (482-484).

Then, also for the third time,* the possibility of Wooden representing himself was suggested.

> The Court: Mr. Cohn, you are a very experienced attorney. All you can do is offer advice and if it isn't to be taken, then that is another story. If this defendant should conclude that he wants to try his own case, and I have said this before, and I say it again, that is his privilege, but I don't think it has reached that point yet. If such a thing happened, I still would have you gentlemen sit by and advise him if he wished to afford himself of that advice. The court can't do any more. * * *
> (484)

The District Attorney was uncertain whether Wooden's statement that he had no counsel meant that he "was also attemtping to discharge Mr. Brown." The Court replied merely that "whatever he said is on the record," and denied the request for permission to retain counsel on the ground there was no showing of financial ability to do so (484-485).

Fourth Motion and Application to Proceed Pro Se

On the seventh day, after three alternate jurors had been selected (491) Wooden said that "under the circumstances, the way this case is going, I will defend myself" (493). He felt "forced to do this" despite a sleepless night "before I am represented by these here counsel." He asked permission to speak to the Court privately "to express my deepest reasons, why I cannot go any further with these here counsel." Told to speak "on the record," Wooden said the lawyers urged him to "take a plea" which to him meant "they feel I am guilty" and he did not want to go to trial with

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* The prosecutor had made the second suggestion as to Wooden's pro se representation (327).

lawyers who believed him guilty with "nothing to l. e, everything to gain" (494).

Mr. Brown said the obstacles facing the defense had been explained to Wooden who felt "frustrated" but who should not be permitted to represent himself because "there are things here that can be fairly well litigated, but not by him pro se." Mr. Cohn agreed that Wooden did not have "the training, or the bac..ground nor the capacity" to represent himself (495).

The Court again noted counsel's experience; that legal questions were bound to arise and it was "afraid you may not have that ability" needed to handle them, and "I personally think also you would be ill advised to attempt your own defense" (496-497).

Wooden had heard his counsel tell the Court he had not yet even read the Hill trial minutes (375), but now was told the counsel's advice to Wooden was based upon careful analysis, and he was also told:

> You must remember that all the cards in this case are on the table, practically because there was a trial in the Hill matter and that record, with all the witnesses is here. As experienced lawyers they have a duty to analyze this case, and I assume what they have done is to analyze it for you. (497)

Wooden then asked, since the Court repeatedly had said he was intelligent, for the "same rights as anybody else has" (498), whereupon the following occurred:

> The Court: Well, are you saying to this Court that you want to proceed --
> The Defendant: -- Because I have no alternative.
> The Court: Wait a minute. You want to proceed here and question all of these witnesses yourself? You want to open to the jury yourself?

The Defendant: Well, your Honor --

The Court: Do you want to open and do you want to sum up yourself? Is that what you want to do?

The Defendant: I have no alternative, your Honor. Your Honor is forcing me to do it. This Court is forcing me to do it.

The Court: This Court is not forcing you to do anything. This Court is supplying you with skilled counsel. Do you want them or don't you want them?

The Defendant: I don't want them.

The Court: What is that?

The Defendant: I don't want them.

The Court: All right, the Court will take that under advisement.

(498)

Mr. Cohn again asked to be relieved "so that Mr. Wooden may have counsel either assigned to him or counsel selected by him which he approves." The Court reserved decision on Wooden's application, but the motions for relief and substitution had been ruled on "before" (498-499).

The next day the following occurred:

The Court: * * *

Now, yesterday afternoon when we adjourned, I had before me a statement by Mr. Wooden that he wanted to try his own case. Now I know that we are here in court this morning and I want a positive statement made on this record as to whether you insist on your constitutional right to tey your own case. If you do, you will be granted that permission, but that means you have to try your own case.

As I have already told you, I cannot assign other legal counsel and if you insist on trying your own case, I am not going to force these counsel on you. I would assign them, however, and request that they remain in court so they will be available in case you want to use them.

Now, have you decided, Mr. Wooden, what you wish to do?

The Defendant: Yes, sir. I will stick to my opinion. I will not use these counsel for advice even. They have been advising me wrong for twenty-four months and I see no reason to keep with the same advice.

The Court: Are you stating your wish to avail yourself of your constitutional rights?

The Defendant: I have no choice.

The Court: I don't care whether you have a choice or not. I want a clear answer.

The Defendant: I have a clear answer.

The Court: Do you want to try your own case?

The Defendant: Yes.

The Court: And you realize, so that the record is perfectly clear, that it will be your responsibility then to elicit cross-examination and do all the things that are necessary in the course of this trial? You understand that, sir?

The Defendant: Yes, sir.

The Court: And you have thought this over?

The Defendant: I have been thinking it over, your Honor, for the last two months. There is something else I want to say for the record.

The Court: You may, but let's get this clear then. You do want to try your case?

The Defendant: I don't even want them at the table with me.

The Court: They are going to be in court. It is up to you, later on it is up to you if you want to avail yourself of their help; if you don't, that help is not to be forced upon you.

The Defendant: Your Honor, this Court has seen fit to put me in a position that maybe you can alter it very simply or you could leave it as it is, but I say that with all due respect to the Court, I think everything has been not just here.

First of all, I make a motion that these two detectives be removed from the court. I know they are going to testify. Also, I think the jury should be dismissed because these two detectives helped pick the jury and they are now going to testify for the People in the People's behalf. I would like a decision on that; and second of all --

The Court: I will make a decision on that.

The Defendant: Second of all, I would like to have a little more time to prepare myself. I didn't think I would have to do this; I thought the Court would grant me legal counsel, so I would like myself to have a little time, because I would like all the papers Mr. Cohn has in my behalf and all the papers Mr. Brown has in my behalf so I can study them.

(500-502)

The Court granted Wooden's request because "as I understand the law, I have no alternative" when a "defendant wishes to conduct his own defense" (503).

Mr. Cohn moved for a mistrial on the ground that the Court's denial of the original request for a substitution -- "I think he then would have been satisfied with almost any counsel provided it wasn't me" -- was error since delay would have involved only one or two weeks, within the original schedule, there was no prejudice to the prosecution, and prospective jurors had not even been brought into the courtroom for examination (503-505). Counsel noted that it was not too late to reconsider since the original schedule could still be followed and, if not, that the Smith trial could possibly go forward with the witnesses available against Wooden. To proceed now would be a "charade" (505) since Wooden had "a miniscule education" and "considerable difficulty in speaking, in reading and knowing written words" (506).

The District Attorney commented that "these are Mr. Wooden's decisions," and that Wooden "has every right to do what he wants" (506-507). The prosecution still made no claim of prejudice, a fact which Mr. Cohn stressed by comparing a two week delay with two years in jail awaiting a possible sentence of life imprisonment (507).

> The Court: * * *
> Now what you are saying here is that the Court should assign other counsel. This is what it gets down to; and the law of this state has been established in many, many cases that that will not be done. The Court of Appeals has passed upon this, and there is good and sufficient reason why this law is as it is. This is not the first defendant that has come into this Court and made similar requests. As a matter of fact, this Court had a similar case, the case that just preceded this. It was not a murder case, but it was a serious felony case, and this comes about time and time again in this Court, that when a case is finally moved for trial, a defendant makes this request.

Now, if these requests were to be granted in this case, it would have to be granted in other cases; and we would have a policy here of never getting a firm date. There is an exception, of course, when a defendant can come in Court and say "I can hire my own attorney, I have the means or I can get the means," and he will be given an opportunity to do so. But, in effect, what this Defendant is saying is that he wants to name his own assigned attorney, and this cannot be done. I haven't made that law. That law is on the books and you are familiar, I am sure, with a long line of cases which hold that; and he is asking me to overturn that, in effect, to let him have some assigned attorney of his own choosing. This I cannot do and there is a very good reason for it.

Now, with respect to his trying his own case, there is plenty of precedence in that, too. I point out the case of People v. Pitman, which was a murder case reported in 25, Appellate Division 637. It went up on Appeal. There, likewise, the two defendants insisted that they wanted to try their own case, and the Court had no alternative but to let them do so, and appointed the assigned attorneys as stand-by attorneys. This was upheld by the Court of Appeals, and it seems to me that is the only thing that can be done. I think, regardless of whether this man is wise or unwise, the constitution says he has the right to try his own case. We can't take that right away from him. I think Mr. Brown made it very clear on the record to explain it to him, but he insists on trying his own case, there is nothing I can do about it.

(508-509)

The District Attorney would not object if the Court wanted to give Wooden "some time to avail himself of these papers and to familiarize himself with all the papers" (510).

Mr. Cohn said Wooden was not freely and voluntarily assuming the responsibility of defending himself, but was "acting out of sheer frustration out of the fact that he doesn't want us to be his attorneys and your Honor is forcing us on him" (510).

The Court: Do you say I can relieve you and assign other assigned counsel?

Mr. Cohn: I say your Honor can do this, adjourn it for two weeks, assign other counsel to this defendant, or perhaps let Mr. Rivers come into court. He has not been

brought into the court. He has not, to my knowledge at least, been asked by the Court if he could defend this defendant, as the defendant has asked.

The Court: Mr. Cohn, you have stated this before. I don't have the citation at my fingertips, but this matter has been raised time and again in other cases. It is People v. Brabson, which was a murder case, in which this very question was raised, and the Court of Appeals has turned it down, and this was a murder case when, I understand, the death penalty was in force.

There was a request on the appeal that this should have been done. Now, you are asking for something that has been established time and again, and this Court is not going to change this principle, because once it does, this calendar is in chaos, and you may not understand that, but I feel quite certain that this defendant understands this. In my mind I think he understands this thoroughly, and this Court is not going to be put in a position where defendants are going to come in here and make these applications. There is ample precedent for what I am doing. As a matter of fact, I have no alternative but to do what I am doing. I regret that he wants to try his own case, but if that is what he wants to do, that is what he will be permitted to do. If I had any option in the matter, I might act differently, but all I can do is give him advice.

The reason I adjourned it overnight was to give him an opportunity to think about it. He now says that he has thought about it, and I don't know what more we can do. If this isn't his voluntary act, then I don't know what can be a voluntary act.

Of course, I realize that he would rather have the choice of appointing some other counsel, but this I will not do.

The Defendant: Excuse me, may I say something?

The Court: Now, just a moment. I am not going to prolong this, but I am going to ask you a couple of questions.

Now, you wanted some time to look at some papers you say?

(510-511)

Having insisted that Wooden turn to the matter of an adjournment sufficient to allow him to prepare his own defense, the Court asked if he had seen the Hill trial minutes (512) Wooden had not, so the part that was at hand was given him. The Court then asked of counsel:

> The Court: I don't want to go into your lawyer-client relationship and I don't want you to discuss anything, but haven't you in some way gone over those minutes in any part with Mr. Wooden? Isn't he familiar with the nature of the evidence that was introduced at the trial and we have disclosed, for example --
>
> The Court: Without going into it, I assume in the normal course of events you would have done that and I assume that to some extent he must have already been apprised.
>
> Mr. Cohn: I will turn the minutes over to him, your Honor. (512)

The matter was dropped without further discussion of the validity of the Court's assumptions.

Mr. Brown questioned whether in these circumstances Wooden could intelligently waive counsel (514). The Court thought it would be error to inflict counsel upon him (515). The District Attorney said that to assign new counsel would be to prolong "this trial ad infinitum and ad nauseam" because "the first time he disagrees with him" Wooden would discharge a new attorney. Still no claim of actual prejudice was made (516-517). Thereupon the Court granted a four day adjournment from Thursday to Monday (including Good Friday) and Wooden promised to "be as fast as possible" (517).

The Court instructed counsel that they were not relieved of the assignment, but they were not to force themselves upon the defendant. They were to sit at or just behind the counsel table, and were not to rise or object to anything unless the defendant wished them to. Counsel were assured "there is plenty of precedent for this. This happens in many cases," and that "you are to sit here until he consults with you. Otherwise there is nothing to do" (517-518).

Trial was to be formally opened on Monday, March 30, but Wooden was not ready. He had not been able to read the 3100 pages of material in three days (he got them Thursday night), and he didn't "think that was fair" (522, 527). The Court explained the situation briefly to the jury and elicited an open declaration of Wooden's intention to represent himself (522). The jury was then excused.

Wooden got the Court's help to borrow "Gilbert's Code and Penal Law," (523) and then began an exchange during which he successively and confusedly (523-529) stated his intentions to take advice from Mr. Brown (523), to try his own case (525), to let Mr. Brown try it with counsel from him (525), to accept "whatever" Mr. Brown does (525), and after colloquy between the Court and the District Attorney about the lingering uncertainty of his actual intention, Wooden said "I will conduct and I will look to them for legal advice" (529).

The Court commented again about the Hill minutes, observing that it was "sure your attorneys have sat down with you. They ha tried to analyze in the past the evidence" (525). When Wooden asked for additional time to study the minutes the following occurred:

> The Court: Haven't those minutes been explained to you prior?
> The Defendant: No, sir.
> The Court: Well, your attorney indicated that he had gone over some of the minutes with you prior to this adjournment last Wednesday.
> The Defendant: No, sir.
> The Court: He did not explain to you what some of the testimony was in the Hill trial?

The Defendant: The only testimony I have had any indication about was Leitha Smith's, and that was it. (527)

The Court again dropped the subject and said, "we are going to proceed. If you should find yourself needing time later, why you can make another application" (527).

After the prosecution opened (529-534), Wooden indicated that he had been wrong to withdraw his request for time, that he "didn't know this was going to happen" because he had read the minutes "not with the intent of defending myself, really, your Honor." He was "just not ready" after only a few days to read 3100 pages. The Court insisted that "we will proceed" but Wooden insisted that he could not (534).

Convinced that Wooden was "bent upon delaying these proceedings" the Court noted that he had been "consulting with Mr. Brown practically throughout the morning here" and that after almost two years on the calendar, counsel had asked for an adjournment; that "we have had delays here" (2 weekdays, one a religious holiday); and that "you have made motions." The Court had "afforded you every opportunity to try this case," and would "not brook any further delay." The request for time was denied with the observations that counsel were "eminent" that they "are well prepared to try this case," that they have "told this court on the record that they have discussed it with you from time to time, the case, at least portions of the case, portions of the Hill case." Wooden said he had not "seen the attorneys since the Hill case, so how could they discuss it with me?" The Court wanted no further discussion because "this case has to go ahead, Mr. Wooden, and it is going to go now" (535-536).

It did.

THE TRIAL

PAUL FITZGERALD (536-540), and ROBERT HILBERT (540-545) placed three Negroes at the Mineola station shortly before the crime. THEOPHILUS JONES saw the victim fall in the street outside the station moments after a Negro man left it (546-548). No one identified Wooden as one of the men they saw.

DR. AMANCIO GENILO pronounced the victim dead (549-550) and DR. DANIEL P. McCARTHY performed the autopsy that indicated death by gunshot wound (550-557).

DET. RICHARD JANNELLI testified that the fatal bullet came from a particular weapon (558-567) and ROBERT E. SWANK testified that $387 was missing from the station, including a number of dimes and the unlikely amount of "134 in $5 bills" (567-571).

Of these five witnesses there was little or no cross-examination by the defendant. The District Attorney observed that the trial had "been moving along a little faster than I expected" (573).

The People then called BETTY MACK, mother of co-defendant Smith's child (579) and under indictment (reduced to a Youthful Offender Information) for first degree perjury at the Hill trial, and promised immunity from use against her of any statements she might make (573, 575). She placed defendant in the company of his co-defendants on the evening before the crime and established their joint departure from her

house only a few hours prior to it. There was no cross-examination.

The jury had heard not one word concerning her indictment for perjury.

Allaying the prosecutor's concern that he might have a "duty" to disclose the facts to the jury, the Court suggested it was the defendant's "right" to elicit the information of which he was already aware, and suggested he confer with counsel. The record indicates Wooden "conferred" with Mr. Brown before moving for a mistrial on the ground the witness was incapable of telling the truth and said, "I don't think the jury had to have known this, although I don't see no reason why for me to mention it, because the District Attorney definitely knew this fact." The motion was denied, the District Attorney observing that the indictment was not relevant on capacity although it "would weigh upon the jury so far as the credibility of this witness is concerned." Nonetheless, the witness was dismissed (585-586).

LEITHA SMITH, Ceasar Hill's cousin and Willie Smith's sister, and also indicted for perjury and promised the same "immunity" (588), was sworn over defendant's objection (586-602). On the day before the crime Wooden and his co-defendants were at her home and defendant spoke of a "job" he had been "planning" (594-596).

The prosecutor again avoided the perjury issue but Wooden raised it by cross which consisted solely of asking if the witness had "ever told a lie under oath" and being told, "No, not that I know of, but they say that I lied, so I guess I did" (603). Redirect established only that she was under indictment for perjury in connection with another matter, "not right here" (603).

Outside the presence of the jury the Court indicated "the jury should know that she testified differently as to this particular matter on another occasion," but the prosecutor suggested that he should ask her only if the perjury was alleged to have occurred "during" the Hill trial. The Court then changed its mind, feeling that the jury should hear no mention of co-defendants and should know only that it involved "some other trial" (604) to avoid speculation as to what may have been the result of a co-defendant's trial (606). The Court directed the prosecutor not to mention the Hill trial at all and offered Wooden the right to ask further questions, but he declined (606). The "immunity" aspect was not even mentioned.

The witness was dismissed without disclosure that the perjury involved testimony, at a co-defendant's trial, on the same issues, and that she had been promised a type of "immunity."

The jury was dismissed for the day and Wooden asked for a copy of the ballistics report to "study it" but since there was only one copy he was promised a copy before the start of trial on the morrow (607).

BONNIE EDWARDS, a sister of a co-defendant (Smith) placed Wooden in the company of his co-defendants on the eve of the crime and quoted his reference to doing a "job." She was briefly cross-examined as to prior inconsistent statements (609-616).

JOHN BANKS, a co-defendant, then testified for the People who disclosed that he would be allowed to plead to manslaughter (620). Banks testified that near the scene of the crime but outside the presence of the defendant, Hill and Smith had said "Let's go. Woody shot a man" (637). Defendant's motion for a mistrial was denied, the response ordered struck, and the jury told to disregard it with the most elaborate such warning given

them in the trial (637-638). Wooden questioned Banks about his bargain with the District Attorney, prompting the District Attorney to reveal a further inducement not previously disclosed -- "that his cooperation would be brought to the attention of the sentencing judge" (646-649).

After WILLIAM HOLLEY testified concerning the gun (654-662) the District Attorney wanted the record to indicate that Wooden had been "availing himself of counsel" with respect to "almost every point or with every witness." Mr. Brown twice declared it was "unture" because Wooden had not asked "the right questions" and his orders were to accomodate only Wooden's specific requests. Mr. Brown was frustrated by "witnessing what is an obvious miscarriage of justice," since Wooden was incapable of conducting his own defense. The District Attorney did not know "what is going on back there" but referred to it as "consulting with his attorney." Mr. Brown stated that Wooden had not consulted him on the "most critical" matters, including the appearance of "self confessed perjurers." The Court indicated it could not stop Wooden from doing what he had decided to do without committing error (663-667).

Nassau County Patrolmen GUNTER (668-671) and SEFTON (671-674) described Wooden's arrest and admissions (673) and DET. LT. GUIDO described his own post-arrest interrogation (675-680). They were not cross-examined.

There was no objection by Wooden, or by the Court on his behalf, to Lt. Guido's testimony that he had said to Wooden: "Will Smith and Ceasar say you did the shooting" (678).

The District Attorney was granted a 24-hour recess because of a problem with witnesses, defendant objecting that the court had not given him time to prepare and that after two years the District Attorney should be ready (681-682).

The next day, Wooden waived cross-examination of the ballistics expert (Jannelli) because it would take time to study his report which he just got and there "would be a great delay" despite the Court's offer to have him recalled (686).

MARY JONES testified to the three co-defendants and "a fellow named Woody" chipping in of an undisclosed number of dimes and single dollar bills in her home for liquor a few hours after the crime. The defendant waived cross-examination (687-689).

DOROTHY GREEN testified to an admission (691, a-16) made by the defendant weeks subsequent to the crime and was briefly questioned by the defendant about prior inconsistent statements (692-695, a-17-20).

DET. LAZORCAK described the taking of the typed confession from Wooden following his arrest (696-700). The Court offered Wooden an opportunity to "confer" with counsel, if you wish to confer with him" but he waived a voir dire examination (701-702). The confession was then received over objection and read, interrupted briefly by Wooden's questioning, with the Court's indulgence, to establish that it was entirely in his own words (702-704). After the statement was read the defendant asked a few questions concerning line-ups (713-714).

LAURA PALMER was called, again to establish the presence of three unidentified Negroes at the scnee shortly before the crime and the defendant asked further ineffectual questions concerning line-ups (714-717). DET. HUNTER also described the taking of the typed confession and for the third time, without any greater indication to the jury of its significance, Wooden asked about line-ups (718-726). At one point Wooden wanted "to ask Mr. Brown some advice" and was told to "go right ahead" (724). Nothing of consequence followed.

DONALD J. WHITE, the District Attorney's confidential reporter, described the taking of the second confession by the trial prosecutor in the late hours following the defendant's arrest and his confession to the police. There was no cross-examination (726-729).

The statement was read and the People rested (750).

The Court made and denied motins to dismiss on the usual grounds, Wooden preferring that the Court not "put any motion on the record for me" (751). Since the defendant did not yet know whether he intended to produce any evidence, the Court decided to finish for the day and called Wooden's "attention to the fact that counsel is available to you, in the event that you should wish any proposed charges to be submitted to the court" (754).

The next morning Wooden rested and declined summation either personally or through counsel, and declined any opportunity to have counsel prepare requested charges. The Court then decided that, this being Friday, it would prefer to complete the case Monday morning (755-758). The District Attorney again asked to have the record indicate that Wooden had "conversed"

with Mr. Brown on "numerous occasions." The Court put on the record that it had observed defendant conversing with Mr. Brown "from time to time" but did not know "what the conversation was, nor do I wish to inquire" (758). Mr. Brown said that Wooden "utterly failed in conducting this trial in his behalf, in any meaningful way whatsoever." He noted that under the Court's instructions he was "unable to gratuitously advise Mr. Wooden" as to his defense and commented that "this case could have been vigorously and properly defended." The Court again stated its observation of defendant "in conference" with Mr. Brown on numerous occasions during the course of this trial, and could "only reiterate that this man insisted on his right to try his own case," making no reference to the initial and repeated requests for a substitution of counsel (759-760).

The case was adjourned until Monday after Wooden objected to the Court's making further usual motions for him, to which the Court replied:

> Well, you can state anything you want in the record, and this Court has observed you very carefully. I know what you are doing. I think you are deliberately attempting here to make a record that you feel may help you. This Court has availed you of every opportunity to be represented by competent and experienced counsel. This is your decision. As I said before, the Court has made available to you attorneys and the Court has felt as though it has protected you in any way it should, and you can make any objection you wish on the record. I am not, of course, preventing you from doing so.
>
> (762)

Upon arrival in Court the following Monday, Wooden disputed the Court's accusation that he was making a record, stating that the Court had not tried to help "until the last two days." He said that the Court had protected the District Attorney's record rather than his own, and complained:

* * * Some time during the case I lost contact with you and with the District Attorney, but at no time did I try to make any record but what I thought was a fair trial.

This has not been a fair trial to me and I think that your Honor, the Judge, had seen fit to say different things about me, but I think it is really unfair, and for the record, I think it is still a rotten trial.

(764-765)

The Court suggested Mr. Wooden could have his attorneys sum up and was reminded "they are not my attorneys, your Honor." The defendant then summed up:

The Defendant: Good Morning, gentlemen of the jury. I only have a few things to say. My summation will be based on one thing. I am innocent of this charge. I don't know how you are going to react to this, but there are certain evidence that have been put to the case and certain that haven't been brought out by the People.

The People have not tried to show at any time that there was another defendant positively identified for this crime indicted for this crime and released from this crime or consisting of one family and one family alone. Each one of this family testified against me as being the defendant. There is a lot of things that should have been stated a little clearly to the record. There have been a lot of promises made to this defendant, which the Court I think will tell you in his charges, and a lot of these people are -- well, everyone that testified against me I think out of this one family is indicted for a felony in this Court. They have previous records and they will all get leniency from the Court for the testimony that they have given.

I am not trying to persuade you to do anything. I hope that you will give me a fair verdict.

Thank you.

(765-766)

The District Attorney's summation (766-773) made no reference to the perjury indictments against two of his witnesses although he did defend the credibility of John Banks (768). He reminded the jury that they had "had an opportunity to observe the witnesses" knowing that in fact they were significantly uninformed as to crucial matters affecting the credibility of at least two of them (773).

The Judge then charged the jury which returned a verdict in 87 minutes.

On May 18, 1970 Wooden appeared for sentence (823-833). Because he did not "really know the legal points," he allowed counsel to move for a new trial, for arrest of judgment based upon lack of trial counsel, and to set aside the Huntley rulings (826). Mr. Brown said the trial had been unfair and that the Court should retrospectively reconsider Wooden's ability to have intelligently waived counsel (828). All motions were denied and Wooden was sentenced to 25 years to life, with an explanation of his right to counsel on appeal and a final reminder that he could handle his own appeal if he wanted to (832).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT VI

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusations; to be confronted with witnesses against him and to have the assistance of counsel for his defense."

UNITED STATES CONSTITUTION, AMENDMENT XIV

> " * * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *"

NEW YORK CODE OF CRIMINAL PROCEDURE, Section 339

(re-enacted as Criminal Procedure Law 60.22)

> "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

NEW YORK PENAL LAW, Section 125.25 (3)

> * * * It is an affirmative defense that the defendant:
>
> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
>
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
>
> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious injury.

ARGUMENT

POINT I

ADMISSION INTO EVIDENCE OF PETITIONER-APPELLANT'S POST-INDICTMENT CONFESSION VIOLATED HIS SIXTH AMENDMENT RIGHT TO COUNSEL BECAUSE BOTH HIS CONFESSION AND PURPORTED WAIVER OF RIGHTS WERE ELICITED BY THE POLICE AND DISTRICT ATTORNEY IN THE ABSENCE OF COUNSEL.

A. Summary of Point

This case presents the Court with the question of whether prosecuting authorities (including the prosecuting attorney who would later try the case), may, consistent with the Sixth Amendment, directly interrogate, an indicted defendant, and obtain, in effect pre-trial discovery. The District Court, in holding such activities permissible, not only ignored the teachings of the Judges of this Circuit, See e.g. United States ex rel. Lopez v. Zelker, 344 F. Supp. 1050 (S.D.N.Y.) (Frankel, J) aff'd mem. 465 F. 2d 1405 (2d Cir.), cert. denied 409 U.S. 1049 (1972); United States v. Massimo, 432 F. 2d 324, 327 (2d Cir.) (Friendly, C.J. dissenting), cert. denied 400 U.S. 1022 (1971), (the majority did not reach the issue due to a stipulation entered into in the District Court), but its very reasoning has been rejected by the Supreme Court, on two recent occasions, Tucker v. Michigan, U.S. , 94 S. Ct. 2357 (1974); Kirby v. Illinois, 406 U.S. 682 (1972).

B. Post-indictment statements elicited while the accused is without the assistance of counsel may not be admitted into evidence at trial.

The landmark case dealing with post-indictment interrogation is, Massiah v. United States, 377 U.S. 201 (1964). The Court, in holding

post-indictment interrogation in the absence of counsel to be violative of the Sixth Amendment noted:

> [T]he Constitution, requires reversal of the conviction on the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help.
>
> 377 U.S. at 204

Massiah, admittedly involved a peculiar state of facts. Massiah was out on bail and had retained counsel when he was surreptitiously interrogated by federal agents. The District Court made much of this particular factual situation, holding Massiah to be restricted to its facts, i.e. retained counsel.

Such construction of Massiah, has not only been rejected by this Court, but by the Supreme Court as well.

McLeod v. Ohio, 381 U.S. 356 (1965) (per curiam) rev'g 1 Ohio St. 2d 60, 203 N.E. 2d 349 (1964) is similar to the present case. McLeod was a murder case in which the defendant made a voluntary confession to the police subsequent to indictment, but prior to arraignment and appointment of counsel. McLeod was in custody, and was aware of the fact that he was with the police. The Supreme Court reversed the conviction, citing Massiah. Subsequent to McLeod, this Court said, Massiah applies where "law enforcement authorities have deliberately elicited incriminating statements from a defendant by direct interrogation." United States v. Garcia, 377 F. 2d, 321 (2d Cir.), cert. denied, 389 U.S. 991 (1967).

In United States ex rel. Lopez v. Zelker, 3[illegible] F. Supp. 1050 (S.D.N.Y.)

aff'd mem. 465 F. 2d 1405 (2d Cir.), cert. denied 409 U.S. 1049 (1972) [hereinafter Lopez], Judge Frankel was confronted with this same issue. Lopez was questioned about the details of a state homicide by F.B.I. agents acting pursuant to a federal warrant. Lopez had been indicted, but not yet arraigned nor assigned counsel prior to such interrogation. Despite the fact that the F.B.I. agents had no connection with the state prosecution, and were, in effect acting on a "frolic of their own," Judge Frankel held Massiah applicable.

In light of McLeod and Lopez, it seems clear that the indigent defendant for whom counsel has not yet been assigned has as much right to have counsel present as a defendant whose counsel is a telephone call away. Cf United States v. Wade, 388 U.S. 218, 237, n. 27 (1967). Clearly, Wooden should not have been put through six hours of interrogation and an "examination before trial." The District Attorney could not obtain such pre-trial disclosure by motion, and there is no reason to permit the District Attorney to obtain such disclosure by delaying arraignment. Quite simply, permitting such interrogation, makes the trial an appeal from the interrogation since the prosecutor could decide at his whim when an indigent indicted defendant would be arraigned and assigned counsel. Cf Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971). As Judge (now Chief Justice) Burger viewed it, if arraignment must be delayed because of the hour, the police and district attorney may not interrogate the defendant until such arraignment. Spriggs v. United States, 118 U.S. App. D.C. 248, 253, 335 F. 2d 283, 288 (1964) (Burger, J. dissenting).

The District Court, relying upon dicta in a Seventh Circuit opinion,

United States v. Crisp, 435 F. 2d 354 (7th Cir. 1970) viewed Massiah as overruled. In Crisp, the defendant sent for F.B.I. agents and asked them to convey information to the United States Attorney. Such wholly volunteered statements do not come within the Massiah holding at all, see, e.g. United States v. Gaynor, 472 F. 2d 899 (2d Cir. 1973) and cases cited therein at 900. More important the dicta in Crisp has been rejected by the Seventh Circuit itself in light of the later Supreme Court holding in Kirby v. Illinois, 406 U.S. 682 (1972). United States v. Durham, 475 F. 2d 208 (7th Cir. 1973) (limiting Crisp to its facts); United States ex rel. Chabanea v. Liek, 366 F. Supp. 72 (E.D. Wisc. 1973).

In any event, the District Court should have followed the law as it exists in this Circuit which holds post-indictment interrogation to be violative of the Sixth Amendment, rather than apply the dicta of the Seventh Circuit to evolve a "blending" theory at total odds with the holdings of this Court.

C. The standard required for a valid waiver of the Sixth Amendment right to counsel at trial is also required for a waiver of that right at any time after indictment.

We note at the outset, that the Massiah decision itself makes no mention of waiver of the right to counsel. Quoting People v. Waterman, 9 N.Y. 2d 561, 565, (1961) the Court stated a role which seems almost absolute:

> Any secret interrogation of the defendant, from and after the finding of the indictment, without the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal cases.
>
> Massiah, supra 377 U.S. at 205.

While there is considerable authority for a per se rule, see e.g. Hancock v. White, 378 F. 2d 479 (1st Cir. 1967); United States v. Durham 475 F. 2d 208, 210-11 (opinion of Sygert, Ch. J.); Herman, The Supreme Court Restrictions on Police Interrogation, 25 Ohio St. L.J. 449, 484 (1964); Cf United States v. Wade, 388 U.S. 218 (1967); United States ex rel. Robinson v. Zelker 468 F. 2d 159, 163 (2d Cir. 1972), cert. denied, 411 U.S. 939 (1973), we do not believe that the court need reach this issue. Under the "at trial" standard for waiver of the right to counsel, a reversal would be mandated here.

The at trial standard for waiver of counsel is indeed, extremely high. In United States v. Harrison, 451 F. 2d 1013 (2d Cir. 1971) (per curiam) the court rejected the contention of any valid waiver where a defendant informs the court that he knows his rights and doesn't desire counsel. The court rejected this argument despite the fact that the defendant, Harrison, was an attorney, presumably a person who would know the value of counsel. See also United States ex rel. Maldonado v. Denno, 348 F. 2d 12, 15 (2d Cir. 1965) (defendant must make an "unequivocal request" to proceed pro se). The court merely followed the opinion of Mr. Justice Black in Von Moltke v. Gillies, 332 U.S. 708, 723 (1948):

> The fact that the accused may tell him [the trial judge] that he is informed of his right to counsel and wishes to waive that right does not automatically end the judges responsibility. To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishment thereunder, possible defenses to the charges and all other facts essential to an understanding of the whole matter.

In a line of cases beginning with Powell v. Alabama, 287 U.S. 45 (1932) the Supreme Court has held the Sixth Amendment guarantee to counsel to apply to all "critical stages" of criminal proceedings. The court in Massiah recognized that absence of counsel during post-indictment interrogation "might deny a defendant effective representation at the only stage when legal aid and advice would help him." 377 U.S. at 204. Accordingly, it is utterly illogical to claim that any lower standard of waiver of the right to counsel would suffice when the Supreme Court has clearly indicated that the need for such assistance may be even greater at this stage of the prosecution than it is at trial. See U.S. ex rel. O'Connor v. New Jersey, 405 F. 2d 632, 636 (3d Cir.), cert. denied, 395 U.S. 923 (1969).

The District Court took the position that Miranda v. Arizona 384 U.S. 436 (1968) established the standards for waiver of constitutional rights at any stage prior to trial, regardless of the existance of any indictment. Such reasoning has been explicitly rejected by this court and implicitly by the Supreme Court.

As Judge Frankel noted in Lopez, supra, 344 F. Supp. at 1054:

> [T]he casual and relatively perfunctory invitation to a Miranda-style waiver is insufficient. When an indictment has come down, riveting tightly the critical right to counsel, a waiver of that right requires the clearest and most explicit explanation of what is being given up. There is no longer the possibility and the law enforcement justification that a mere suspect may win his freedom on the spot by clearing a few things up. Cf United States v. Drummond 354 F. 2d 132, 144 (2d Cir. 1965) (en banc), cert denied, 385 U.S. 1013 (1966).

The procedures for both warnings and waiver which the Court prescribed in Miranda were designed to meet particular problems presented by custodial interrogation during the investigation of a crime. It would be perverse to use that decision, intended to protect the privilege against self-incrimination, as authority for a relaxation of the standards previously enunciated for the Sixth Amendment right to counsel. "Blending" of the fifth and sixth amendments would result in a dilution of the precious and disparate rights guaranteed by those amendments.

In Michigan v. Tucker —U.S.—, 94 S. Ct. 2357 (1974), a case in which right to counsel under the sixth and fourteenth amendments was not involved, (94 S. Ct. at 2360), the Supreme Court again held that Miranda rights are not rights protected by the Constitution, but rather are "procedural safeguards" designed to protect the Fifth Amendment privilege against self-incrimination. 94 S.Ct. at 2364.

The Court, as it had in Kirby v. Illinois limited Escobedo v. Illinois, 378 U.S. 478 to its peculiar factual situation.

Thus, Tucker clarifies the point that Miranda is strictly confined to the particular problems presented by custodial interrogation of suspects during criminal investigations. Massiah is not so limited. After a suspect is indicted, "Sixth Amendment rights are triggered" United States ex rel. Irving v. Henderson, 371 F. Supp 1266, 1273-4 (S.D.N.Y. 1974) (Weinfeld, J), and even non custodial interrogation is prohibited unless counsel is present.

Unlike Miranda, Massiah deals with the specific guarantee of the Sixth Amendment. Significantly, the case was not decided as it might have been, on the grounds that no warnings were given (Massiah was not even aware that he was being interrogated), but on the basis of the broad principle that post-indictment interrogation of an accused in the absence of counsel constitutes a denial of the basic protections of Sixth Amendment guarantees. Massiah v. United States, 377 U.S. at 206. Since Massiah was not in custody, Miranda could not, even now, apply to the facts of his case.

The Supreme Court's opinion in Kirby v. Illinois, supra 406 U.S. 682 (1972), rejects the reasoning applied by the District Court. In the course of the Kirby opinion, the Court notes that "the Miranda decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination" and refers to the Sixth Amendment right to counsel as "a quite different constitutional guarantee." 406 U.S. at 688.

The Court held that "the outset of formal prosecutorial proceedings" is absolutely critical for the right of counsel:

> In a line of constitutional cases in this court stemming back to the Court's landmark opinion in Powell v. Alabama, 287 U.S. at 45, it has been firmly established that a persons Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversory judicial proceedings have been initiated against him. See, Powell v. Alabama supra; Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114; Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799; White v. Maryland, 373 U.S. 59, 83 S Ct. 1050, 10 L. Ed. 2d 193; Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246; United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926,

18 L. Ed. 2d 1149; Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178; Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 26 L.Ed. 2d 387. [emphasis supplied]

> This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself.*** (T)he point is that, while members of the Court have differed as to the existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings --whether by way of formal charge, preliminary hearing, indictment, information or arraignment. [emphasis in original]
>
> 406 U.S. at 688-689

The Court calls Escobedo v. Illinois, 378 U.S. 478 (1964) which the District Court relied upon for its assertion that the existence of a formal indictment should have no effect on the right to counsel--"(T)he only seeming deviation from this long line of constitutional decisions." It then holds, in effect, that Escobedo like Miranda, is not really a right to counsel decision:

> ***Escobedo is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the "prime purpose" of Escobedo was not to vindicate the constitutional right to counsel as such, but, like Miranda "to guarantee full effectuation of the privilege against self-incrimination***" Johnson v. New Jersey, 384 U.S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of Escobedo to its own facts, Johnson v. New Jersey, supra, at 733-734.***
>
> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have been solidified. It is then that a defendant finds himself faced with the prosecutorial forces of

> organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. See Powell v. Alabama, 287 U.S. 45, 66-71; Spano v. New York, 360 U.S. 315, 324 (Douglas, J., concurring)
>
> 406 U.S. at 688-690.

Following Kirby, this Court per Judge Oakes, explicitly rejected the contention that Miranda-warnings would ever suffice for waiver of a Sixth Amendment right. United States ex rel. Robinson v. Zelker, 468 F. 2d, 159, 163 (2d Cir. 1972), cert. denied, 411 U.S. 939 (1973). We submit that this arises from the fact that after an indictment has been returned the state has absolutely no right to interrogate a defendant since the investigating phase is over and preparation for trial has begun. Indeed, it is difficult to conceive of any circumstances under which it would be wise or intelligent for an indicted defendant to submit to interrogation in the absence of counsel.

In the New York Court of Appeals, the district attorney argued that he should be given the right to interrogate indicted defendants in the absence of counsel since there is no "harm to the innocent" and there is in effect nothing wrong with presenting a voluntary confession to a jury as evidence of the facts (Res. Brief N.Y. Ct. of Appeals at 43, a-26). In effect then, the District Attorney, desires to bring back the rack and end the adversary system of criminal justice. We urge the Court to reject this contention.

As Judge (now Chief Judge) Breitel stated in his dissenting opinion in the Court of Appeals (held by Judge Frankel to be the correct statement

of federal constitutional law, 344 F. Supp. at 1054):

> Whatever vitality a waiver rule might have under the Miranda doctrine, other considerations require a contrary rule in the area of post- indictment interrogation. After criminal action is begun, it is no longer a general inquiry into an unsolved crime, but rather a form of pre-trial discovery; it is no longer a suspect who is being interrogated, but the accused; the interest in affording the police an opportunity to carry on investigating interrogation for the purpose of reaching a decision to charge and in what degree is diminished. In short, the defendant is all but the irrevocable target, and the preparation for his trial has begun.
>
> People v. Gustavo-Lopez, 28 N.Y. 2d 23, 28-29, 319 N.Y.S. 2d 825, 829 (1971) (dissenting opinion).

The assistance of counsel cannot be effective, and the fundamental fairness of the trial cannot be insured, if the prosecution is permitted, on the basis of out-of-court "waivers" given by an uncounselled defendant in custody to interrogate that defendant right up to the time of his trial. As Judge Friendly put in his dissent in United States v. Massimo, 432 F. 2d 324, 327 (2d Cir. 1970) (the majority did not reach the issue due to a stipulation entered into by defense counsel in the district court):

> Since Massimo's "criminal prosecution" had begun (with his arraignment), the Sixth Amendment entitled him to counsel at any "critical stage***" which interrogation to elicit his guilt surely was, unless the protection was waived. Warnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendments strictures against testimonial compulsion would not necessarily meet what I regard as the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached.

When an accused seeks to waive his right to counsel at trial, or before making a plea of guilty, he is scrupulously questioned by an impartial judge, who must try to impress upon him the importance of having counsel and "advise against the likely folly of a layman's proceeding without the aid of a lawyer." Lopez, 344 F. Supp. at 1054. As Judge Frankel wrote:

> (W)e cannot settle for less when the waiver has been proposed by a law enforcement officer whose goals are clearly hostile to the interests of the already indicted person in custody.
>
> 344 F. Supp. at 1054

When as in petitioner's case, an arrest is made subsequent to indictment and the accused has no lawyer, the proper procedure would be to take him before a magistrate who has the power to appoint one. It is at this point that a waiver, if there is one, can be made, and the accused's rights under Von Moltke and Massiah can be protected. Cf. U.S. ex rel. Robinson v. Zelker, supra.

In so far as the District Court would make the right to counsel depend upon a request, this contention must be rejected. Once the right to counsel attaches, as it did here,

> [I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request.
>
> Carnley v. Cochran, 369 U.S. 506, 513 (1962)
> See also Kitchen v. Smith, 401 U.S. 847 (1971) (per curiam)

In closing on this sub-point, we wish to direct the Court's attention to Mr. Justice Stewart's concurring opinion in Spano v. New York, 360 U.S. 315, 326-7 (1961):

> Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. At every stage of those proceedings the accused has an absolute right to a lawyer's help.*** # What followed the petitioner's surrender in this case was not arraignment in a court of law, but an all-night inquisition in a prosecutor's office [and] a police station.

D. Petitioner did not knowingly and intelligently waive his Sixth Amendment right to counsel.

An indicted person who is subjected to police interrogation in the absence of counsel cannot be held to have made a knowing and intelligent waiver of his Sixth Amendment rights when he has merely been given Miranda warnings.

In the present case there was no showing that petitioner "fully comprehended [his] perilous position" nor that he had "an apprehension of the nature of the charges, *** the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter," as Von Moltke v. Gillies, requires.332 U.S. at 720, 724. Wooden was clearly in need of counsel, and any impartial magistrate before whom he sought to waive his right to counsel would have been obliged to inform him of the right and the need. Certainly, a magistrate would not inform an accused "I don't know***But your friends have been arrested and claim that you did everything.***want a lawyer?"

Justice Stewart's reference to the death penalty in the omitted portion no longer has any relevance in light of Gideon v. Wainwright, 372 U.S. 335 (1962)

Even under the alternative stark legal fact holding of Judge Frankel in the Lopez decision the waiver would remain ineffectual. At the time of the purported waivers Wooden was obviously aware that he was being held in connection with the Mineola railroad station hold-up but he was not informed of the precise nature of the charge--felony murder (the prosecutor did not tell Wooden that he was even indicted). Knowledge of the precise nature of the accusation, along with the legal implications may have indeed changed the willingness of petitioner to talk.

Under New York Penal Law Section 125.25 (3), felony-murder liability is imposed not only upon the actual killer, but upon the non-killer accomplice as well. Wooden, an unintelligent layman, obviously felt that the fact that he "was not the shooter" would exculpate him from the murder charge. More important the Penal Law admits a four-fold affirmative defense. The police and prosecutor by "leveling" with him were able to elicit the fact that Wooden knew that an accomplice was armed, and indeed that he possessed a knife "all the time that he was in the station", thus cutting off any affirmative defense to the felony murder charge.

The crucial importance to the accused of precise information concerning the charges against him is recognized in the Sixth Amendment itself. In addition to guaranteeing that in a criminal proceeding the accused shall have the right to "the assistance of counsel for his defense," it also states that he "shall enjoy the right ***to be informed of the nature and cause of

accusation." Clearly the fact that one has been indicted for felony-murder would have legal significance to a lawyer. A defendant cannot be held to have made a knowing and informed waiver of his Sixth Amendment right to counsel when he has not been given information which the same amendment recognizes to be essential in preparing his defense. Under the facts of this case, not telling Wooden that he had been indicted for felony murder was a cleverly designed deception to get Wooden to attempt to exculpate himself, and to in fact inculpate himself: Wooden fell into the trap.

When Wooden was interrogated by the police, and went through an "examination before trial" with the very prosecutor who would try his case, he lacked the guidance of a lawyer (and was clearly at a legal disadvantage with both) and a clear understanding of the legal significance of his admissions. Any one of these could suffice to render his purported waiver invalid and the subsequent confessions inadmissible.

POINT II

THE USE IN EVIDENCE OF PETITIONER'S POST-INDICTMENT STATEMENTS WAS NOT HARMLESS ERROR.

Wooden's statements to the police and prosecutor were used at trial as part of the prosecution's case in chief and the prosecutor relied heavily upon them in his summation (771, 772). Not only was the harmless error argument not made in the state courts, (see Lopez, supra, 344 F. Supp. at 1055 indicating that this is to be a fact to be considered in determining harmless error) but rather the district attorney argued that his case was "obviously very weak" in the absence of the post-indictment confession (Res. Brief N.Y. Ct. of Appeals at p. 40, a-22). Said the District Attorney:

> ...The case against Wooden at this juncture was obviously very weak, the indictment notwithstanding. It consisted in the main in the Grand Jury testimony of Betty Mack and Laura May Smith [both indicted for perjury] (p. 40, a-22).
>
> ***
>
> ...Wooden [was] indicted on the naked, unsupported testimony of Betty Mack...
>
> Even after James Smith and Kenney Lewis had been exonerated the case against William Wooden was no stronger because he was not in custody, he had never been viewed by the eyewitnesses, and had never been interviewed by the authorities
>
> In fact, even after Ceasar Hill, Jr., and John Banks had been arrested, interviewed, and made a statement, the case against William Wooden was not legally any stronger for Grand Jury purposes because the four eyewitnesses could still not

identify him, there had been no lineup and the confessions of Hill, Jr., Willie Smith and John Banks were not legal evidence against Wooden.

The case rested on the interested and obviously biased testimony of Willie Smith's sister, Leitha May Smith, and Willie Smith's girlfriend, Betty Mack...

(P. 41, 42, a-24, a-25).
(emphasis added)

The argument of the district attorney, i.e. that the confessions were necessary seems justified.

At the trial, Smith and Mack, under indictment for their testimony at the previous trial of the co-defendant Hill (with whom the district attorney had arranged a "deal") only testified as to the planning of a job; highly circumstantial evidence. They could not place Wooden at the scene of the crime.

More important, without the post-indictment confession, Banks' testimony would not have been corroborated and therefore inadmissible under New York Law. The applicable New York statute stated:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

(C.C.P. Section 399, re-enacted in slightly different form as C.P.L. 60.22).

Outside of the confession there was no other evidence which would have connected petitioner to the crime and accordingly, Banks' testimony would have been inadmissible as the district attorney so well recognized. See People v. Kress, 284 N.Y. 452 31 N.E. 2d 898 (1944); People v. Hayes, 37

App. Div. 2d 375 325 N.Y.S. 2d 815 (1st Dept. 1971).

In any event it is apparent that these statements were a decisive factor giving credibility to the testimony of these sordid characters.

As to Dorothy Green, her testimony was for all practical purposes immaterial. Green testified that Wooden said "he had shot someone" (691, 695)(we include this testimony in the appendix at a-16, a-20). There is absolutely no connection to the Mineola Railroad Station holdup and it certainly has no corroborative or probative effect.

In People v. Kress, 284 N.Y. 452, 31 N.E. 2d 898 (1940), the New York Court of Appeals discussed the requirement of corroboration under this statute. In discussing the quality of corroboration required, the Court noted:

> The independent evidence must be material evidence other than that of the accomplice and must fairly and reasonably tend to connect the defendant with the commission of the crime (citations omitted)...[W]here the corroborative evidence standing alone has no real tendency to connect defendant with the commission of the crime, it is insufficient (citations omitted)... Evidence of mere association of defendant with perpetrators of the crime at a time antecedent to its commission is insufficient...[W]here the corroborative evidence does not show actual participation of defendant in the crime itself, the fact must also be established independently of the testimony of the accomplice...
>
> 284 N.Y. at 460 [emphasis in original].

In light of Kress, it is quickly seen that Green's testimony was insufficient to corroborate the Banks' testimony.

Under Chapman v. California, 386 U.S. 18 (1967) the state must "prove beyond a reasonable doubt that the error complained of did not contribute to

the verdict obtained." Id. at 24. That is the standard to be applied here. Milton v. Wainwright, 407 U.S. 371 (1972)(5-4)* Under the circumstances of this case, there is simply no way of knowing what shape the trial could have had, what course the defense would have taken, or what would have been the effect upon the jury if the prosecutor had not made direct use of petitioner's pre-trial statements. Certainly, there was no case without the Banks' testimony. Accordingly, under these circumstances, this Court will not view the error as harmless. United States v. Castello, 426 F. 2d 905 (2d Cir. 1970).

Since there remains, at the very least, "a reasonable possibility that the evidence complained of might have contributed to the conviction", Chapman, supra, 386 U.S. at 23, the state has failed to meet the burden of proving that it was harmless.

Since excising the confessions would have dramatically weakened the district attorney's case, the statements were not "icing on the cake" but rather the cake itself as the prosecutor himself observed.

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*In Milton there were three confessions by the defendant. The majority held that since two of the confessions were conceedingly admissible, the admission of the third confession was harmless.

POINT III

FORCING THE PETITIONER TO PROCEED WITH HIS OWN DEFENSE PRO SE VIOLATED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A. Summary of Point

Petitioner, a defendant in a murder case, defended himself, when his lead assigned counsel was unprepared. The trial judge made no inquiry into petitioner's allegations other than to determine that petitioner lacked funds to obtain counsel on his own. Appellant contends that the District Court erred in failing to apply (nor for that matter even cite or discuss) the standards for indigent waivers laid down by this Court in United States v. Morrissey, 461 F. 2d 666 (2d Cir. 1972). Moreover, the District Court failed to apply the applicable standards for waiver laid down in the many decisions of this Court.

B. Since the record indicates that the trial judge failed to make any reasonable inquiry into petitioner's allegations and gave petitioner the impression that he was forced to proceed pro se an effective waiver may not be found.

In United States v. Morrissey, 461 F. 2d 666 (2d Cir. 1972), this Court laid down the appropriate standards to be followed where an indigent defendant claims ineffective assistance of counsel and seeks to proceed pro se. The Court held that a perfunctory, surface inquiry by the trial judge is insufficient noting:

> The courts cannot give with one hand an indigent defendant the right to appointed counsel and then, with the other hand, effectively

take that right away by refusing to recognize the possibility that defendant's allegations of inadequate representation might prove correct after detail inquiry.

461 F. 2d at 669 n. 6, 670

See also, United States v. Calabro, 467 F. 2d 973, 985-987 (2d Cir. 1972).

While, it is true that in the Morrissey case the Court affirmed the conviction, this occurred only after the court was able to conclude that Morrissey's dissatisfaction with counsel was unwarranted and it was clear that his claims were untrue. Here, it is clear, by admissions of counsel on the record, that such claims were in fact true.

The district court characterized petitioner's complaints as "trivial" (D.C. Opinion, p. 14,a-13) However, aside from the fact that the court incorrectly stated many of petitioner's contentions, some of them taken alone are sufficient to indicate an inadequately prepared attorney.

1. Lead counsel did not know that two of the witnesses against petitioner had been indicted for perjury. If the Supreme Court has taken the position that failure to disclose the fact that a witness had been indicted and has been offered immunity is sufficient reason to reverse a conviction, see, e.g. DeMarco v. United States, -U.S.-, 94 S. Ct. 1185 (1974)(per curiam); Giglio v. United States, 405 U.S. 150 (1972), it seems erroneous to characterize petitioner's dissatisfaction with counsel for his lawyer's ignorance of the perjury indictments as "petty." Rather, it seems to be prima facie evidence of utter

lack of preparation for trial. More important, counsel revealed total ignorance as to whether the indicted perjurer had testified for the prosecution or the defense.

2. Cohn was not aware of the deal between Banks (a co-defendant) and the district attorney. Since Banks was an accomplice, knowledge that he was going to testify would seem crucial for any defense attorney. cf DeMarco v. United States, supra.

3. Failure to read the Hill minutes. The trial judge himself indicated that he felt that it was experienced counsel's "duty" to read and analyze those minutes which put "all the cards...on the table". (497). It should be remembered that Cohn never read the Hill minutes at all before coming to court for trial.

In Britt v. North Carolina, 404 U.S. 226 (1971) the Supreme Court has recognized the constitutional significance of this valuable discovery device, but it is still up to trial counsel to read them. This seems hardly a "petty" complaint.

4. Cohn failed to visit petitioner until the eve of trial. The district court characterized this argument as Cohn not visiting often enough. This characterization was not petitioner's argument. Petitioner submits that Cohn was required to obtain matters of defense from him--by letter, telephone or any method. See, e.g. White v. Ragan, 324 U.S. 760 (1945)(failure to confer with a defendant until the time of trial held, among other complaints, to be a prima facie violation of petitioner's constitutional right to effective assistance

of counsel); Coles v. Peyton, 389 F. 2d 224, (4th Cir.), cert. denied, 393 U.S. 849 (1968); Sawicki v. Johnson, 475 F. 2d 183 (6th Cir. 1973) citing United States v. Morrissey, 461 F. 2d 666, 669 (2d Cir. 1972).

Clearly, in light of the authorities cited, these were major flaws in preparation of which any trial judge was bound to take note. Nevertheless the trial judge took the position that the law would not permit a substitution of counsel under any circumstances (302-303, 500-502).

The district court excused such preparation on several grounds. One being that there was "no farce or mockery of justice." That standard is not applied in a pro se case -- but rather where a defendant has gone through a trial with counsel and now claims that his earlier attorney was incompetent. See U.S. ex rel Crispin v. Mancusi, 448 F. 2d 233 (2d Cir.), cert. denied 404 US (1971) relied upon by the court below. Secondly, the district court claimed that Brown could have handled the case. This may be so -- indeed Brown was willing to handle the case -- but with an adjournment (298); he wanted other counsel to help him and a week to ten days to prepare (298). It was error for the district court to hold petitioner responsible for Brown's unwillingness to handle the case alone. The district court also viewed Mr. Brown's conversations with petitioner as having substance. However, Mr. Brown clearly indicated that he was not assisting in any way (758). Likewise, the record contains no

indication that Wooden sought to choose his own counsel. In fact Wooden realized that the court would have to chose --not Wooden (290-291).

Under United States v. Morrissey, supra, inquiry was clearly required. See also A. B. A. Project on Minimum Standards for Criminal Justice, Standards Relating to Defense Services, Section 53, p.p. 50-51. However, we not only lack that inquiry, but we have a trial judge who suggested to the defendant that he defend himself.

United States v. Woods, 487 F. 2d 1218 (5th Cir. 1973) is substantially similar to the instant case. There the court held Woods' "waiver" to be insufficient, even though the court appointed attorney was "highly competent", as at the outset of the trial, Woods complained that the attorney was unprepared to proceed with the defense in view of the lack of communication between attorney and client. In Woods the "highly competent" attorney stood moot, here we have direct admissions on the record of lack of preparation. Woods also recognizes the need for a sound lawyer-client relationship which relationship clearly includes the ability to communicate.

Sawicki v. Johnson, 475 F. 2d 183 (6th Cir. 1973) saw a similar argument. The Court again held such complaints substantial and required an evidentiary hearing to determine whether such complaints were warranted. We submit, without more, that under this Circuit's holding in United States v. Morrissey, supra, the district court did not give adequate attention to petitioner's claims and therefore it committed error.

C. Since petitioner felt "forced" to proceed pro se the purported waiver is inadequate.

The record shows that the trial judge merely inquired as to whether petitioner desired to exercise his "constitutional right" to defend himself (500) in spite of his protestations of feeling forced. The trial judge did not determine whether Wooden had an "apprehension of the charges, the statutory offenses included in them, the range of allowable punishments, possible defenses to the charges and circumstances in mitigation thereof..."as Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) and United States v. Harrison, 451 F. 2d 1013 (2d Cir. 1971) require.

More important, the defendant's protestations of feeling "forced", in and of itself precludes an effective waiver. United States ex rel Higgins v. Fay, 364 F. 2d 219 (2d Cir. 1966); cf United States v. Calabro, 467 F. 2d 973, 985 (2d Cir. 1972). Indeed the record must show that the choice was made with "his eyes wide open". United States v. Plattner,330 F. 2d 271, 276 (2d Cir. 1964); cf United States v. Duty, 447 F. 2d 449, 450 (2d Cir. 1971)(per curiam).

We submit that the very fact of Wooden's earnest and repeated requests that the Court replace an evidently unprepared and uninformed lawyer is itself evidence of the importance Wooden placed on going to trial with counsel.

D. The resulting "trial" was prejudicial to the defendant.

As expected, the resulting trial, replete with errors was indeed a "mockery of justice". See Powell v. Alabama, supra, 287 U.S. at 68-69. The entire case against Wooden consisted of his "confession" and hearsay evidence of the worst sort. Through the hearsay testimony (678) the People twice called Willie Smith and Ceasar Hill to say, as eyewitnesses, that Wooden was the actual killer. Smith and Hill were of course unavailable for cross-examination. Any attempt to cross-examine them, if they were called, would have met with claims of Fifth Amendment self-incrimination. Pointer v. Texas, 380 U.S. 400 (1965), Douglas v. Alabama, 380 U.S. 415 (1965). This was federal constitutional error. Younger, Confrontation and Hearsay, 1 Hofstra L. Rev. 32 (1973) Therefore, in and of themselves they are errors requiring a new trial.

Wooden's inadequate defense was compounded by: (1) The trial court's refusal to bring to the jury's attention the fact of the perjury indictment, the immunity promises to both Leitha Smith and Betty Mack and the Banks deal (777-778). We submit under these circumstances, the defendant being without counsel, this was tantamount to, and clearly just as harmful as a deliberate failure to correct false testimony bearing on the credibility of a material witness. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959). (2) The trial court's refusal to grant Wooden any additional time to prepare his own defense. This despite the fact that the trial court indicated

that Wooden was exercising his "constitutional right to act as his own attorney." (3) The court's refusal to permit stand-by counsel to call error to its attention without getting advance permission from Wooden (517-518). Compare United States v. Spencer, 439 F. 2d 1047, 1051 (2d Cir. 1971); Mayburry v. Pennsylvania, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring).

CONCLUSION

Defendant's conviction resulted from multiple violations of his Sixth Amendment rights. The District Court erred in not following the decisions of this Court which hold post-indictment interrogation under the circumstances disclosed impermissible and requiring diligent inquiry before permitting an indigent defendant to proceed pro se. Accordingly, the judgment of the district court should be reversed and remanded with directions to issue the writ if petitioner is not retried within sixty (60) days of this Court's mandate.

Respectfully submitted,

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On the Brief

[OPINION AND ORDER OF
KEVIN THOMAS DUFFY]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel
WILLIAM WOODEN,

Petitioner,

-against-

LEON J. VINCENT, Superintendent,
Greenhaven Correctional Facility,
Stormville, New York,

Respondent.
----------X

OPINION AND ORDER

73 Civ. 4973

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[OPINION AND ORDER OF
KEVIN THOMAS DUFFY]

KEVIN THOMAS DUFFY, D. J.

William Wooden, the petitioner, seeks a writ of habeas corpus to overturn his conviction in the Nassau County Court, on May 18, 1970, after a trial by jury, of Murder, Manslaughter First Degree, Robbery First Degree and Grand Larceny, Third Degree. Wooden was sentenced to concurrent terms, the minimum providing twenty-five years to life imprisonment. The judgment was affirmed without opinion by the Appellate Division, Second Department, 38 A.D. 2d 690 (1971) and by the New York State Court of Appeals, 31 N.Y. 2d 434 (1972); and certiorari was denied, 410 U.S. 987. It appears that state remedies have been exhausted within the meaning of Section 2254 of Title 28 U.S.C.

The petition is grounded on two points: (1) that post-indictment, post-arrest statements of petitioner should not have been admitted at trial because they were made at a time when counsel had not yet been appointed for petitioner; and (2) that the trial court should not have forced petitioner to defend himself pro se, albeit with two able counsel sitting with him. The memorandum of law submitted by counsel also argues that the petitioner's conviction was improper because of certain evidentiary errors of the trial court. (All of these issues have been considered and will be disposed of in this opinion and order.)

[OPINION AND ORDER OF
KEVIN THOMAS DUFFY]

William Wooden was one of four who wantonly killed John Hartel, the station agent at the Long Island Railroad Station in Mineola, New York, on February 18, 1968, and stole some $384.00 from the station. Hartel was shot in the back while opening the ticket agent's booth on that day. After the murder the group fled and the petitioner Wooden made his way to Boston.

On March 12, 1968, the petitioner with his accomplices was indicted by a grand jury in Nassau County.

Some weeks after the indictment, on April 28, 1968, at about 8:00 p.m., two Nassau County patrolmen responded to a report that the A & Z Construction Company burglary alarm had been activated. Arriving at the scene the patrolmen saw the petitioner leaving the building. Patrolman Linwood Gunter recognized the defendant, and knew that there was a warrant for his arrest. The petitioner fled upon seeing the police car but was chased by the patrolman, who finally apprehended him. Patrolman Gunter immediately told petitioner "You don't have to say anything. Anything you say can be used against you in court." The petitioner, who apparently was not ignorant of the procedure, replied, "I know my rights." Patrolman Gunter continued by saying, "You're entitled to have a lawyer at any time and if you can't afford one the County will get you one." To this the petitioner replied, "I don't want a lawyer."

[OPINION AND ORDER OF
KEVIN THOMAS DUFFY]

The petitioner was taken by the patrolmen to the 3rd Precinct in Nassau where he was formally "booked". Wooden was then taken upstairs to the Detectives' Squad Room. There Detective Lieutenant Guido informed the petitioner that he wanted to question him, advised him that he had already been indicted for murder, and started to advise petitioner of his rights. The petitioner interrupted stating that he knew his rights. Detective Guido, however, said "Well, that's all well and good, but I want to go over them with you so there is no misunderstanding." Detective Lieutenant Guido thereupon recited to petitioner all of the normal "Miranda" warnings. At the end of this recitation Guido told petitioner "Now, I ask you again, knowing your rights, are you willing to talk to us without an attorney being present or without talking to an attorney?" To this the petitioner replied, "Yes.. I'll talk to you ... I tried to tell you before."

Thereupon the petitioner told his version of the events of the night of the murder. Basically, the petitioner admitted his participation in the burglary but attempted to exculpate himself from the murder by saying that one of his co-defendants had possession of the weapon used. Detective Lieutenant Guido had Detective Lazorcak type up petitioner's statement. The detectives advised Wooden that they were going to ask "the District Attorney to come in ..." to which Wooden replied "Yes, bring him in. I'll tell him, too."

Detective Lieutenant Guido left after some fifteen minutes and Detective Lazorcak offered the petitioner some coffee and read to him his rights as set forth on a card that Lazorcak carried. Lazorcak then started questioning the petitioner and typing up the statement as he talked. Sometime thereafter, two other detectives arrived and one of them took over the typing chore. At the completion of the questioning, Wooden reviewed a six page detailed statement, made some corrections and signed the statement.

After the statement was signed, one of the detectives took petitioner into another office where two Assistant District Attorneys and a stenotype reporter were present. Once again Wooden was advised of his rights, including his right to counsel. He stated he knew his rights but he wanted to talk. Once again he gave his version of his implication in the burglary and murder.

At no time during the night of his arrest did the petitioner ask for an attorney although the services of counsel was offered to him on at least four different occasions. There is no claim that any of the confessions or admissions by the petitioner on the night of his arrest were coerced.

At his arraignment petitioner was assigned two defense counsel, as is the custom in New York State cases where murder is charged. Counsel for the defense moved to suppress all of the petitioner's post-indictment statements. The motion was denied and the statements were admitted in evidence at the time of trial.

The statements were "icing on the cake" at the petitioner's trial since one of his co-defendants testified against him and other witnesses told of his admissions to them. For example, Dorothy Greene, whom the petitioner had visited in Boston after the crime, testified that she forced Wooden to leave her home because of a conversation in which he admitted that he had shot someone.

In any event, it is claimed that the admission of the petitioner's post-indictment, pre-arraignment statements, made without counsel having been appointed, constitutes a violation of his right to counsel as guaranteed by the United States Constitution, Amendment VI. In support of this argument petitioner relied heavily on Massiah v. United States, 377 U.S. 201 (1964) which held:

> "...the petitioner was denied the basic protections of that guarantee [of counsel as provided by Amendment VI of the Constitution] when there was used against him at trial evidence of his own incriminating words which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel."
>
> 377 U.S. at 206.

The petitioner interprets the holding of the United States Supreme Court in Massiah, supra, to mean that there can be no waiver of the right to counsel under

any circumstances after the initiation of criminal proceedings against a person.

I disagree.

The Massiah case must be read in the context in which it arose. There the defendant had already been arraigned and had retained counsel when the government surreptitiously obtained the incriminating statements without the presence of counsel. That situation is a far cry from the facts presented by the case at bar, where the petitioner repeatedly refused the assistance of counsel before volunteering his statement.

Furthermore, the simplistic argument advanced by petitioner ignores the growth of the law since the Massiah case and particularly the decisions of the Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964). Both these cases make it abundantly clear that the right to counsel may be waived. Counsel for the petitioner argue that these cases are inapposite since they involved situations where the interrogations took place after the defendants were in custody but prior to indictment. In fact, the argument is made that Miranda and Escobedo permit a waiver of the right to counsel under the Fifth Amendment but such a waiver may not be permitted under the Sixth Amendment once an indictment has been returned against the defendant. This argument hangs on mere formalism, i.e., that

no anti-criminal legal action begins until the return of an indictment. In the real world, governmental anti-criminal action begins when the defendant is first detained. This is the beginning of the entire process and the rights of the defendant must be considered as appertaining at that point rather than waiting for the formal written indictment to be filed. Throughout the process we have a blending of the rights guaranteed by the Fifth and Sixth Amendments, rights which cannot be dissected merely because a formal indictment has been returned. United States v. Drummond, 354 F. 2d 132, 150 (2d Cir. 1965), cert. denied, 384 U.S. 1013 (1966).

The Seventh Circuit has held

> "Massiah and McLeod must be read in light of the Supreme Court's subsequent decision in Miranda v. Arizona, 384 U.S. 436, 475...which expressly recognized the validity of a knowing and voluntary waiver of rights during the 'critical state' of custodial interrogation...As Miranda and Escobedo clearly indicate, formal indictment is no longer the determinative event upon which constitutional safehuards [sic] hinge. By the same token, formal indictment does not absolutize constitutional rights or inexorably rigidify adversary postures. The crucial feature of both Massiah and McLeod was the deliberate acquisition

of information by police from a suspect under circumstances preventing his effective exercise or waiver of his rights to counsel at a time when those rights had clearly attached by virtue of his formal indictment." United States v. Crisp, 435 F. 2d 354, 3548 (7th Cir. 1970).

In the situation presented by the case at bar it is clear that the petitioner was offered counsel and was advised of his right to remain silent at least four times, yet, he consciously and knowingly chose to reject the aid of a lawyer. It has been held "that Massiah commands an absolute right to counsel after indictment" but "a clear explicit, and intelligent waiver may legitimate interrogation without counsel following indictment." U.S. ex rel. O'Connor v. New Jersey, 405 F. 2d 632 (3d Cir. 1969), cert. denied, 395 U.S. 923. Here there was such a clear explicit and intelligent waiver, and therefore no error was made in admitting petitioner's post-indictment statements. In short, the petitioner's argument that the Constitution demands that counsel "must be supplied and not merely offered" at every step in any post-indictment procedure goes far beyond the requirements of the Constitution. If a defendant, as here, knows of his right to be silent and knows of his right to counsel and intentionally waives those rights his statements thereafter are admissible against him.

The petitioner also attacks his conviction as being in violation of the Sixth Amendment since he was not permitted to choose his own counsel at trial or to change counsel on the eve of trial. After his arrest petitioner was initially assigned Irving A. Cohn, Esq. and Robert Corcoran, Esq. as counsel. After the completion of a "Huntley-Miranda" hearing in December 1969, Charles Brown, Esq. replaced Mr. Corcoran. No complaint was heard from petitioner as to his counsel for over two years between his arrest and the date set for trial. On December 22, 1969, the Court set the petitioner's case for trial subject to the completion of a co-defendant's trial scheduled to start on March 2, 1970. On March 16, 1970, Mr. Cohn and Mr. Brown appeared with the petitioner for trial. For the first time the petitioner announced his displeasure with Mr. Cohn and asked that he be relieved because Mr. Cohn could not communicate with him or protect him. The petitioner also asked that a "Mr. Rivers" be appointed to assist Mr. Brown. Interestingly, the petitioner did not wish to have Mr. Brown relieved, and Mr. Brown applied for a week to ten days adjournment to prepare to become lead counsel.

The trial judge denied the motion of the defendant and of defense counsel Cohn to be relieved.

Selection of a jury began and continued for two days until the morning of March 18, 1970, when Mr. Cohn informed the Court that petitioner had

discharged him. Mr. Cohn's application to be relieved was again denied. At this point the defendant made application for the stenographic minutes of the proceedings citing Griffin v. Illinois, 351 U.S. 12 (1956). The trial court indicated that the minutes were available.

On the afternoon of March 23, 1970, while the selection of a jury was still in progress, the petitioner again applied to have Mr. Cohn relieved as his counsel. That application was denied.

The jury was finally selected on March 24, 1970. After the jury had been sworn and excused for the afternoon, petitioner applied to the Court to defend himself. The basic reason advanced by the petitioner for his decision is that both of his assigned counsel had talked to him about entering a plea of guilty. The trial judge advised the petitioner that both of his counsel were able, experienced and competent; that they had the opportunity to review the minutes of the trial of petitioner's co-defendant and that, therefore, they could evaluate the case; and finally that the conduct of the trial would be most difficult for the petitioner. The trial judge withheld decision on Wooden's application overnight.

On the following morning, March 25, 1970, Wooden moved to have all witnesses sequestered, specifically asking to have Detective Lazorcak and Detective Hunter removed from the courtroom until they had testified. The motion was granted with the exception that Detective Hunter was permitted to remain to assist the Assistant District Attorney in presenting the case.

The trial judge then concluded that he had no choice but to permit the petitioner to defend himself but he insisted that the two assigned attorneys remain in the courtroom to assist the petitioner. Mr. Cohn at that point moved for a mistrial. The motion was denied and the trial judge satisfied himself that Wooden was supplied with all of the pertinent documents, including the Court-appointed investigator's reports and the minutes of the trial of the petitioner's co-defendant.

The Court then granted an adjournment of the trial until March 30, 1970.

On the morning of March 30, 1970, the petitioner requested another adjournment and a copy of "Gilbert's Code and Penal Law". He immediately received the requested book. He stated that he would conduct the trial and look to Mr. Cohn and Mr. Brown for advice when necessary.

The trial was then conducted with the petitioner handling his own defense and conferring with Mr. Brown at intervals during the trial. From time to time the trial judge also assisted Wooden by phrasing questions and otherwise making allowances for him.

From my review of the transcript of the trial and the entire proceedings as reflected in the two volume Record on Appeal to the Appellate Division, Second Department, it is clear that the proceedings were in all respects fair and should not be overturned. Certainly, the proceedings did not ever approach a "sham or mockery of justice" so as to require some action by this Court.

[OPINION AND ORDER OF
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U.S. ex rel Crispen v. Mancusi, 448 F. 2d 223 (2d Cir. 1971).

Petitioner's attack on his court-appointed counsel is directed solely toward Mr. Cohn and completely ignores the fact that he was afforded two appointed counsel. He did not at the time, nor does he now, protest the assignment of Mr. Brown. It is true that Mr. Cohn was supposedly "lead counsel" but it is completely clear from the record that Mr. Brown was more than capable of conducting Wooden's defense. Brown had been chief counsel to the Legal Aid Society for a number of years and had had an opportunity to acquaint himself with the facts of the case.

In any event, the attack on Mr. Cohn is without merit. Cohn had represented the petitioner in the "Huntley-Miranda" hearing and did a very creditable job. The complaints against Cohn were all petty in nature, to wit:

(1) Cohn did not read the entire transcript of the co-defendant's trial;

(2) Cohn did not personally visit petitioner often enough;

(3) Cohn did not know the sentence given to petitioner's co-defendant;

(4) Cohn was not aware of plea bargaining on behalf of another of petitioner's co-defendants;

(5) Cohn learned first from petitioner that two of the witnesses against him had been indicted for perjury.

All of these complaints are trivial and none of them, either individually or taken together, is enough to prove that petitioner was denied the effective assistance of counsel.

In his memorandum, petitioner also raises certain alleged evidentiary errors committed at his trial. If these are urged to show that he did not receive a fair trial, then the paucity of alleged error proves just the opposite. In each case the jury was instructed by the trial judge either immediately or in the final charge as to how to consider the evidence. Any error clearly does not rise to constitutional proportions.

The petition for a writ of habeas corpus is denied.

SO ORDERED.

s/ KEVIN THOMAS DUFFY
United States District Judge

Dated: New York, New York
July 15, 1974.

[TESTIMONY OF DOROTHY GREEN]

[T. 690]

DOROTHY GREEN, 260 Ruggle Street, Boston Massachusetts, called as a witness on behalf of the People, first being sworn, testified as follows:

Direct examination by Mr. Lewis:

Q. Miss Greene, I show you this picture, People's Exhibit 20, and ask you if you can identify the person whose picture is portrayed thereon? A. That's Johnny. I don't know his last name. First name, Johnny.

Q. And did there come a time, ma'am, in February of 1968 when you saw Johnny? A. Yes, he came to my home.

Q. Where were you living at that time? A. 260 Ruggle Street.

Q. Was anyone with him when he came to your home? A. Woody was with him.

Q. Do you see Woody in the courtroom, Miss Greene? A. Yes, he's sitting there (indicating).

Q. Could you identify him, please for the record, point him out? A. There is Woody, there (indicating).

Q. Would that be the gentlemen on the extreme left of the counsel table? A. Yes.

Q. Now, when did they first come to your house in Boston, Massachusetts, if you remember? A. Well, they came to my son's house first and they stayed at my house two nights. So my son called on the phone--

The Court: Never mind that

Q. Don't tell us what your son said. Did there come a time when they came to your house? A. Yes.

Q. When was that, you tell me when it was. A. They came there

on a ekend. I think it was a Friday.

Q. Was that the end of February? A. Yes, the end of Friday.

Q. Did they stay in your house? A. Yes, they did.

[T. 691]

Q. How long did they stay there? A. They was in there a little over a week.

Q. Did there come a time when they left your house? A. Yes, they left my house.

Q. What, if anything, happened to cause them to leave your house?

The Court: Just a moment. Don't answer that. This calls for almost any sort of an answer.

Q. At the time they left your house, did you have a conversation with either of these people?

The Court: Just yes or no.

A. Yes.

Q. And who was present at this conversation? A. Woody and Johnny and myself.

Q. Where did this conversation take place? A. In my home.

Q. What did Woody say, if anything, to you and what did you say to Woody? A. Well, they were acting nervous and funny, so I asked them what was wrong.

The Court: Never mind what anybody acted like. The question is what did Woody say, if anything.

The Witness: Well, he said he had shot someone.

Q. Did he say anything else? A. No.

Q. What, if anything, did you say to them at that time? A. I told them they had to leave my house.

Mr. Lewis: I have no further questions of the witness, your Honor.

The Defendant: Is there any statements whatsoever?

[T. 692]

Mr. Lewis: May I have marked for identification, your Honor, the three-page handwritten statement dated March 8, 1968, of this witness.

(Whereupon the said document was received and marked People's Exhibit 34 for identification).

Mr. Lewis: And a one-page handwritten statement, signed by this witness, dated April 1, 1968.

(Whereupon, the said document was received and marked People's Exhibit 35 for identification).

Mr. Lewis: May the record indicate, your Honor, that I am giving the aforementioned exhibits to the Defendant.

(Defendant examining exhibits).

Cross-examination by the Defendant:

Q. Good morning, Miss Greene. Did you write this statement, April the 1st? A. Did I write that statement?

Q. Yes, sir. A. Yes, the officer had written it.

Q. You just signed the statement, is that correct? A. I did sign all my statements.

The Defendant: Would you give her this, please (submitting)? Would you tell her to read from here (indicating) to here

(indicating)?

Q. Would you read what I am giving to the man?

The Court: All right, let's first identify it for the record, please.

Personal Officer: 35 for identification.

The Court: Do you want the witness to read People's 35 for identification.

[T. 693]

The Defendant: I would like to have her read where I indicated.

Mr. Lewis: Well, before she reads--

A. --Well, I can't read without--

The Court: --Just a moment, please.

Mr. Lewis: May we have her identify it as her statement?

The Court: You offered it as her statement, is that correct?

Mr. Lewis: Yes, sir.

The Court: Is there any question about it?

Mr. Lewis: I just want to have her say that.

The Court: Miss Greene, just look at it.

The Witness: I don't have my glasses. I can't read it.

The Court: Well, take out your glasses. Do you have your glasses with you?

The Witness: No, I don't. I don't have my glasses with me.

The Defendant: Well, I will read it.

The Court: Let me see the statement.

(Witness submitting to the Court).

The Court: You say you can't read this without your glasses?

The Witness: No, I can't.

The Court: Well, why don't you read it to her then? Is it conceded that this is signed by this witness?

Mr. Lewis: Yes, your Honor.

The Court: Read the portion to which you wish to call her attention.

[T. 694]

Q. I am reading from the signed statement by this witness. It says "Woody said I am involved"--"Woody said he is involved in a killing"--

The Court: --Excuse me, Mr. Wooden, if you would be a little louder, we might be able to follow you.

Q. "Woody said, 'I am involved in a killing.' He said, 'A man was shot.' He didn't say he shot him."

The Defendant: Now, the Defendant just testified under oath--

Mr. Lewis:-- I'm going to object to that. First of all, she is not a Defendant. I am going to object to the speeches, your Honor. Let him ask the question.

The Court: All right. Now, you have read that portion. You want to ask her a question about it?

Q. Did.you give this to the police this morning. Miss Green?

A. That was given by the police, yes.

The Court: No, did you say that to the police? That's what he wants to know.

The Witness: Yes, yes.

The Defendant: No further questions, your Honor.

Redirect examination by Mr. Lewis:

Q. That's what you said on April 1, 1968, is that correct? A. Yes.

The Defendant: Excuse me, what was that date, Mr. Lewis?

[T. 695]

Q. April 1, 1968, the date of the statement, is that correct? A. Yes. When he came, yes. He was at my house twice, the police officer.

Q. Now, you told us, Miss Greene, here today, that Woody said he shot a man, is that correct? A. Yes.

Q. And on April 1st of 1968 in the statement you gave the police, the portion that Mr. Wooden just read to you, it indicates you said he didn't say he shot him, is that correct? A. I guess that's correct.

Q. Well now, to the best of your recollection, Miss Greene, which of the tow is the correct statement? A. Woody said he shot a man.

Q. Is that correct? A. Yes, correct.

Mr. Lewis: No further questions

Recross-examination by the Defendant:

Q. Miss Greene, to which one would you think would be your best recollection, April 1, 1968 or April 2, 1970, to what I said in February of 1968? A. You said it both times, but you said it in February.

The Court: Well, he wants to know whether your recollection would be better?

The Witness: Well, the last statement I made was right, the last statement.

The Defendant: No further questions, your Honor.

Mr. Lewis: I have no further questions.

Mr. Lewis: May I have an opportunity to check to see if another witness is here, your Honor?

The Court: Yes.

[POINT II OF DISTRICT ATTORNEY'S BRIEF
IN THE NEW YORK COURT OF APPEALS]

[39]*
POINT II

Post-indictment confession not incompetent.

(In answer to Appellant's Brief, Point II, pp. 74-83)

Appellate counsel argues the post-indictment confession of Wooden was incompetent, Lopez notwithstanding (28 N.Y. 2d 23) for 3 reasons: (1) the interrogation was not to aid a continuing police investigation; (2) the Lopez doctrine should not apply if the defendant is already represented by counsel; and (3) Wooden did not intelligently waive his right to counsel.

It is admitted Wooden was properly warned of his Fifth and Sixth Amendment rights as required by law (Miranda v. Arizona [1966], 384 U.S. 436).

Moreover, it is undisputed this Court in a non-death case is constitutionally precluded from reviewing the weight of the evidence (Article VI, §3, N.Y.S. Const., People v. Paulin [1969], 25 N.Y. 2d 445; People v. Stephen J. B. [1969], 23 N.Y. 611; People v. Rodney P. [1967], 21 N.Y. 2d 1; People v. Leonti [1966], 18 N.Y. 2d 384).

[40]
Where, as here, the record evidence fully supports the findings of Judge Spitzer that Wooden was warned as required by law, and waived within the meaning of the law, it is firmly established the confession-order of Judge Spitzer is not now reviewable (Article VI, §3, N.Y.S. Const.; People v. Paulin, supra; cf. People v. Stephen J.B., supra; People v. Rodney P., supra; People v. Leonti, supra).

*Refers to pages in the original of the District Attorney's Brief.

[POINT II OF DISTRICT ATTORNEY'S BRIEF
IN THE NEW YORK COURT OF APPEALS]

Whether or not Lopez would apply if Wooden had an attorney when interviewed by the authorities is beside the point because admittedly Wooden did not have an attorney.

Equally specious is the suggestion the interview by the police "was not in aid of any continuing police investigation" (Appellant's Brief, p. 79). In fact, Wooden was a fugitive when the indictment was returned. When Wooden freely and voluntarily confessed, he had not been arraigned on the indictment, and he certainly was not represented by counsel. In fact, this was the initial confrontation between the aut' rities and Wooden.

It is untrue the interview "was not in aid of any continuing police investigation". In fact, the interview was for no other purpose. The case against Wooden at this juncture was obviously very weak, the indictment notwithstanding. It consisted in the main in the Grand Jury testimony of Betty Mack and Laura Mae Smith. It is unreal to expect the homicide authorities to close the case against Wooden under such circumstances as will be pointed out later.

Investigations do not necessarily cease and should not be arbitrarily halted as appellate counsel implies because of an indictment. This case proves the important reasons why. James Smith, a brother of Ceaser Hill, Jr., and Kenny Lewis were originally arrested along with Willie Smith for the murder because they were indentified by eyewitnesses at the scene. It was the continuing

[41]

investigation after the arrest and preliminary arraignment of James Smith, Kenny Lewis and Willie Smith by the homicide authorities from the Nassau County Police Department and the office of the District Attorney of Nassau County which established the innocence of James Smith and Kenny Lewis.

It was the continuing investigation by the same authorities that identified Ceasar Hill, Jr., John Banks and appellant as the real murderers.

This superb police work by a fine Police Department dramatically demonstrates the overpowering need for this Court now to forcefully acknowledge the right, if not the duty, of the police authorities to interview a suspect face to face where possible. There is in the final analysis no substitute for it as we shall see.

Here we had James Smith and Kenny Lewis improperly indentified and Wooden indicted on the naked, unsupported testimony of Betty Mack, the girlfriend of Willie Smith, and Leitha Mae Smith, Willie's sister. Willie's identification by the eyewitness, namely Mrs. Laura Palmer, and Robert W. Hilbert plus his voluntary confession completed the case against Willie Smith, but what about Kenny Lewis and James Smith. The persistent denials of James Smith and Kenny Lewis prompted the authorities to continue the investigation because they were based upon personal interviews and were believable.

Even after James Smith and Kenny Lewis had been exonerated the case against William Wooden was no stronger because he was not in custody, he had

never been viewed by the eyewitnesses, and he had never been interviewed by the authorities.

In fact, even after Ceasar Hill, Jr. and John Banks had been arrested, interviewed, and made a statement, the case against Wooden was not legally any stronger for Grand Jury purposes because the four eyewitnesses could still not identify him, there had been no lineup and the confessions of Hill, Jr., [42] Willie Smith and John Banks were not legal evidence against Wooden.

The case rested on the interested and obviously biased testimony of Willie Smith's sister, Leitha Mae Smith, and Willie Smith's girlfriend, Betty Mack, that Wooden had associated with Hill, Jr., Banks and Willie Smith in their apartment under suspicious, if not criminal circumstances before and after the murder. It was not the kind of testimony that suggests or warrants the case be closed unless we wish to encourage a miscarriage of justice.

Moreover, at the Grand Jury stage, it was not completely certain the girls were innocent. The possibility, if not the probability, strongly existed one or both might have been an accomplice because of guilty knowledge, and the participation in the fruits or proceeds of the robbery, if not actual complicity. It is clear the duty of an alert Police Department and a conscientious District Attorney does not, and must not, come to a halt in such case because of the slim technicalities of a prima facie case. No one but responsible police or law enforcement agency can at this stage of a criminal proceeding separate the truly innocent

from the guilty. It is unnecessary, unwise and not the law that the police interfered with Wooden's constitutional right to counsel because they frankly and honestly confronted him with the results of the investigation at the earliest possible moment.

It is undisputed Wooden knew that his friends had been indicted. In fact, he must have known he had been indicted because he was a fugitive. He was reminded of all of these things at the earliest opportunity. He was advised of the results of the investigation when confronted for the first time by the appropriate police authorities. Wooden was advised he had been indicted for murder and Hill and Smith claimed he was the shooter. All of these facts were told to Wooden before he was interviewed.

[43]

Where is the harm to the innocent in the police interview under these circumstances. If Wooden was truly innocent, he would have said so precisely the way James Smith and Kenny Lewis denied their criminal involvement. If he was guilty and voluntarily confessed, what is so shocking to our society today about presenting the voluntary confession to a trial jury as proof of what has happened.

Even if we test the police action in the case by the dissenters in Lopez (28 N.Y. 2d 23, pp. 26-29), it will not be found lacking because Judge Breitel observed (p. 28):

> "Whatever vitality a waiver rule might have under the Miranda doctrine, other circumstances require a contrary rule in the area of post-arraignment and post-indictment interrogation" (Emphasis supplied.)

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The rationale for this judgment seems clear. Historically, the right to counsel was equated with the commencement of the trial and not the court proceedings against the accused. In fact, the Sixth Amendment specifically reads:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy trial and public trial, *** and to have the Assistance of Counsel for his defense."

This court in the 50's abandoned the traditional test, i.e. arraignment and rolled the right to counsel back to the commencement of the court proceedings (People v. Waterman, 9 N.Y. 2d 561 [indictment]; People v. Meyer, 11 N.Y. 2d 162 [information]).

> In practice, the Meyer-Waterman doctrine did not achieve its objectives because the decision to commence the court proceedings involved a unilateral decision by the police or the District Attorney which the law enforcement officials in New York refused to make if the investigation was not completed.

[44]
Predictably, it will be as futile tomorrow as it was yesterday to re-assert the right to counsel is commensurate with the filing of the information or indictment as distinguished from the arraignment. The facts, in this case dramatically demonstrate why this must be so.

James Smith and Kenny Lewis were mistakenly indentified, leading to the filing of an information. If the police had unilaterally cut off their authority to interview James Smith and Kenny Lewis, there may have been a true miscarriage of justice. James Smith and Kenny Lewis might have been wrongfully convicted

but even if acquitted, the probabilities of identifying Hill, Jr., John Banks and appellant, Wooden, after a trial would have been remote. In either event, the results would not be desirable and should not be encouraged by the rationale of the decisions of this Court.

We must respectfully urge the Court not to adopt an arbitrary standard that is bound to increase and multiply the odds that grievous harm may result in the case of the unwise or inexperienced law enforcement officer. Knowledgeable police officers and prosecuting authorities charged with the heavy burden of investigation today will not and should not deliberately pursue procedures which seriously reduce the likelihood that the truth will follow from their efforts. Standards ought to be permanently adopted that are not only constitutional but fair--fair to the accused and the accuser alike.

Standards that will be unenforceable by the accused are really no standards at all. That is why the Waters-Meyer doctrine did not work as expected.

On the other hand, by resorting to the arraignment instead of the filing of an information or indictment as the cut off period, the authorities will be assured the time needed to do the job expected of them by the people of our state. Moreover, the accused will have enforceable rights recognized in our Constitution and statutory scheme of things today.

[45]

Furthermore, the police will be encouraged to apply for a warrant instead of making a summary arrest. The case will be judicially reviewed by a magistrate

or the Grand Jury as the case may be without the fear that the police have, as a matter of law, forfeited the right to interview the suspect when arrested.

Tested by the foregoing, what does the record in this case reveal:

(1) The murder occurred February 18, 1968.

(2) James Smith, Kenny Lewis and Willie Smith were identified by eyewitnesses and charged by information with the crime of Murder.

(3) The investigation continued leading to the exoneration of James Smith and Kenny Lewis.

(4) The case against Willie Smith remained firm.

(5) Ceasar Hill, Jr., and John Banks were arrested.

(6) Hill, Jr., Banks, Willie Smith and appellant, Wooden, were indicted (3-5) March 12, 1968.

(7) Wooden was arrested the evening of April 28, 1968, and voluntarily confessed the same night at the Third Precinct stationhouse, Williston Park.

(8) April 29, 1968 Wooden was produced in the Nassau County Court for arraignment. Counsel was assigned and the arraignment was adjourned to May 2, 1968.

(9) The actual arraignment took place on May 2, 1968, with Irving Cohn and Robert Corcoran assigned counsel present.

The circumstances surrounding Wooden's arrest for an unrelated burglary

and the matter of the interview leading to the statement or confession were explored (68-261) extensively in a pre-trial hearing ranging over 3 days, and which commenced on October 8, 1969. Judge Spitzer after careful consideration [46] concluded the confession was voluntary, and the Fifth and Sixth Amendment rights of the accused were complied with.

Nothing recently decided in the Southern District requires a different determination (United States ex rel Gustavo Lopez v. Zelker,). Apparently Judge Frankel has sustained a writ of habeas corpus in favor of Gustavo Lopez (28 N.Y. 2d 23), concluding Lopez did not knowingly and intelligently waive his right to counsel because he was not advised he had been indicted for Murder before he waived and confessed. The writ of habeas corpus has been upheld by the Court of Appeals without opinion though it does not appear the case in either court has been reported officially. It can be located at "72 Civ. 1117" in the office of the Clerk of the United States District Court, Southern District, New York.

It is undisputed the decisions of a United States District Court Judge are not in law binding on this court. Moreover, even if they were controlling, it would not in this case require a different result because Wooden was advised he had been indicted for Murder before he waived his Fifth and Sixth Amendment rights, and before he confessed. Specifically, the uncontradicted testimony of

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Detective-Lieutenant Guido at the confession hearing was as follows-(156-157):

"Q. And would you tell us, lieutenant, to the best of your recollection what you said to Mr. Wooden and what Mr. Wooden said to you, sir? A. Yes, I said to him that I suppose that he knew that it had to come to this sooner or later.

I told him that I wanted to ask him some questions. I told him that before I did I wanted to make sure that he understood exactly where he stood here.

I said to him that he had been indicted for murder in connection with a killing at the Mineola railroad station, and I said that I wanted to explain his rights to him.

(47)

He stopped me and he said, 'I know what my rights are.' Then I said, 'Well, that's all well and good, but I want to go over them with you so there is no misunderstanding.'

I then said to him that he didn't have to answer any questions at all, that he could remain completely silent.

Then I told him that if he did decide to answer any questions or talk to us, then that anything he did say could be used as evidence against him in court.

I asked him if he understood that and he nodded his head and he said, 'Yes' that he did.

Then I told him that he had a right to have an attorney present, that he had a right to talk to that attorney, see the lawyer before he decided whether he wanted to answer any questions or not, and that if, after having spoken to that lawyer he decided he did want to talk to us, that he then could have the lawyer with him during that whole time.

I then told him that if he couldn't afford a lawyer, that an attorney would be appointed for him by the Court and that we wouldn't ask him any questions until that time, if that was his wish, and again I asked him if he understood that, and he said, 'Yes.' And he said,

'But what difference does it make? I'm going to get life or 60 years, which is life to me, anyway.'

He said, 'There is three in the same family against me.'

I told him I didn't know what he was going to get. All I wanted to know was that, knowing his rights, understanding his rights, did he want to talk to us now without having an attorney present, or without talking to an attorney, that three other people had been indicted with him for murder, that they told us their version of what had happened.

And he said to me, 'Well, what did they tell you?'

[48]

And I said, 'Well, I am going to level with you. Ceasar Hill and Willie Smith both say you did the shooting. Johnny Banks says he was asleep in the car so he doesn't know for sure who did the shooting,' and I said 'Now, I ask you again, knowing your rights, are you willing to talk to us without an attorney being present, or without talking to an attorney?'

And he said, 'Yes.' He said, 'I'll talk to you.' He said, 'I tried to tell you before.'"

It is respectfully submitted the findings of the trial judge are amply supported by the record. There is no legal impediment to the admissibility of the confession. The judgment of conviction should not be overturned.

[DOCKET SHEET]

U. S. A. EX REL W. WOODEN VS. LEON J. VINCENT ETC.

73 Civ 4973

JUDGE DUFFY

DATE	PROCEEDING	DATE ORDER OF JUDGMENT NO.
Nov 20-73	Filed petition for Writ of Habeas Corpus.	
Nov 20-73	Filed order permitting the petitioner to proceed in forma pauperis, Gagliardi, J.	
Nov 20-73	Filed notice of motion for an order directing that petitioner be released from custody unless retried within 60 days... Ret. Dec. 4-73 at 9:30 a.m.	
Nov 20-73	Filed memorandum of law for petitioner	
Nov 23-73	Filed petitioner's affdvt. of service by mail by Perry S. Reich dated 11-21-73 on Attorney General, State of N.Y.	
Dec 18-73	Filed respondent's memorandum of law.	
Dec 20-73	Filed Petitioner's reply memorandum of law.	
July 15-74	Filed Opinion #40962 and Order - for reasons indicated herein, the petition for a writ of habeas corpus is denied. So ordered - DUFFY, J. (m/n)	
July 29-74	Filed petitioner's petition to proceed in forma pauperis on appeal.	
July 29-74	Filed memo endorsed on petition filed 7-29-74. Motion to proceed in forma pauperis granted. So ordered - DUFFY, J.	
July 31-74	Filed petitioner's notice of appeal from order dismissing the petition entered 7-15-74. Copy to: Louis Lefkowitz, Atty. Gen., State of N.Y. Ent. 7-31-74	

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of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No 74-2042
~~Index No.~~

UNITED STATES OF AMERICA
ex rel WILLIAM WOODEN
Appellant ~~Plaintiff~~

against

LEON J. VINCENT, Superintendent
Green Haven Correctional Facility,
Stormville, New York
Appellee
~~Defendant~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF Nassau *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 11 Harrison Avenue
Hempstead, New York

That on the 21st *day of* August *19*74 *deponent served the annexed*
Brief for Petitioner-Appellant
on Arlene Silverman, Assistant Attorney General
attorney(s) for Respondent-Appellee
in this action at 2 World Trade Center, New York, New York
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office ✕ official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me
this 21st *day of* August *19*74

Tanya McDougald
Tanya McDougald
The name signed must be printed beneath

GERALDINE MOORE
NOTARY PUBLIC, State of New York
No. 2758030
Qualified in Nassau County
Commission Expires March 30, 19 75

Geraldine Moore

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C 321—Affirmation of Service by Mail.
Affidavit of Service by Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on the day of 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in -- a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this day of 19

.....
The name signed must be printed beneath

Attorney at Law